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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 554.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY,
GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS ON THE CENTRAL OF GEORGIA RAILWAY,
T. A. HOLLINGSWORTH, GENERAL CHAIRMAN,
H. L. BISHOP, JR., VICE CHAIRMAN,
H. E. HIMES, C. L. COWAN, H. L. STEPHENS, J. W. FARR and C. M. GOBER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals For the Fifth Circuit and BRIEF IN SUPPORT THEREOF with Appendix.

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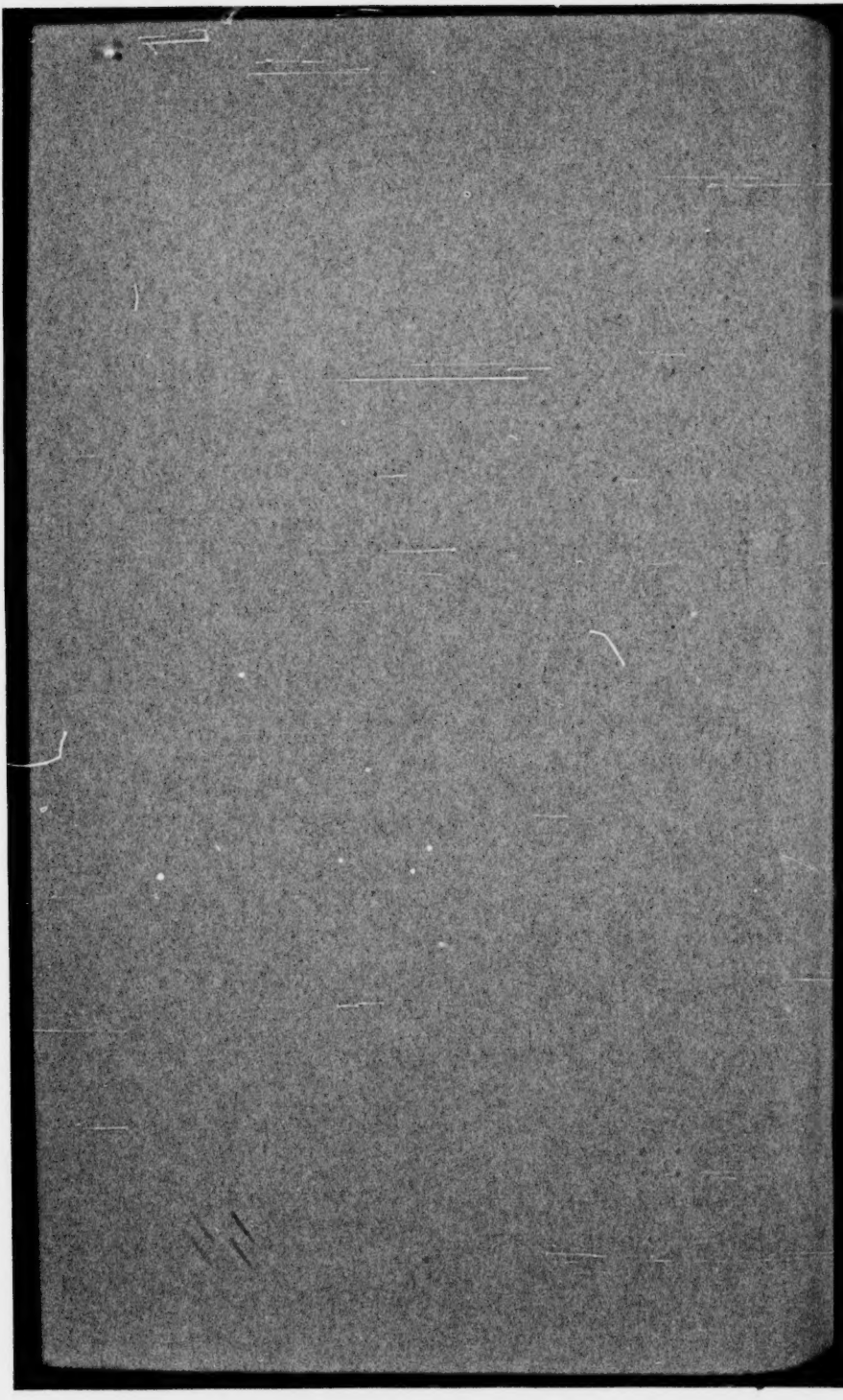

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H. E. HIMES, C. L. COWAN, H. L. STEPHENS, J. W. FARR and C. M. GOBER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit.

May it Please the Court:

Petitioner, Brotherhood of Locomotive Firemen and Enginemen, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause, Case No. 13,969, affirming a judgment entered by the United States District Court for the Northern District of Georgia dismissing petitioner's complaint.

OPINIONS BELOW.

The district court did not issue an opinion in support of its judgment of dismissal. The opinion of the Court of Appeals (R. 75-77) is reported in 199 F. 2d 384.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 31, 1952 (R. 78). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (now 28 U. S. C. Sec. 1254).

QUESTIONS PRESENTED.

1. Whether dismissal of petitioner's complaint on the grounds that the First Division of the National Railroad Adjustment Board has exclusive jurisdiction of petitioner's cause of action, deprives the petitioner of due process of law in violation of the Fifth Amendment to the Federal Constitution because six of the ten members constituting the First Division have a personal interest in ruling against the petitioner's claim if it is submitted to the Adjustment Board for decision.

2. Whether refusal by the district court to consider evidence tendered by the petitioner in opposition to respondents' motions to dismiss plaintiff's complaint, based upon this Court's decisions in *Order of Railway Conductors v. Pitney,* 326 U. S. 561, and *Slocum v. D., L. & W. R. Co.,* 339 U. S. 239, was error.

CONSTITUTIONAL PROVISIONS INVOLVED.

This case involves the Due Process Clause of the Fifth Amendment to the Constitution.

STATEMENT.

This action was instituted on January 3, 1950, by the petitioner, Brotherhood of Locomotive Firemen and Enginemen (hereinafter sometimes referred to as the "Firemen's Brotherhood"), in its capacity as representative for the purposes of the Railway Labor Act, of the firemen's craft employed on the Central of Georgia Railway (hereinafter sometimes referred to as the "Central of Georgia") (R. 17). Joined with the Firemen's Brotherhood as plaintiffs were George Ketterbaugh and R. F. Hooker, employees having seniority rights as firemen and engineers on the Central of Georgia (R. 3).

The defendants were the Central of Georgia; the Grand International Brotherhood of Locomotive Engineers (hereinafter sometimes referred to as the "Engineers' Brotherhood"); the General Committee of Adjustment of the Engineers' Brotherhood, and the individual members comprising the General Committee of Adjustment (R. 3-5). The General Committee of Adjustment functions as the agent of the Engineers' Brotherhood in the performance of the latter's duties as representative, for the purposes of the Railway Labor Act, of the engineers' craft employed on the Central of Georgia.

The gist of the action stated in the complaint is that the Central of Georgia, on July 20, 1948, changed the rules and working conditions under which firemen were displaced by engineers, or under which engineers working as firemen were returned to service as engineers, as such rules and working conditions are contained in a certain tripartite agreement entered into by the Central of Georgia with the Firemen's Brotherhood and the Engineers' Brotherhood on April 19, 1946 (R. 10). The April 19, 1946, agreement was consistently enforced by the Central of Georgia until July 20, 1948 (R. 9). On this date a new

agreement entered into by the Central of Georgia and the Engineers' Brotherhood changed the working conditions as established by the April 19, 1946, agreement (R. 10).

This change in the rules and working conditions accomplished by the Central of Georgia on July 20, 1948, was inaugurated without notice of a desire to make such change first being given to the Firemen's Brotherhood, or other action being taken as required by Section 6 of the Railway Labor Act (45 U. S. C. Sec. 156) (R. 12-13). Section 2, Seventh, of the Railway Labor Act (45 U. S. C. Sec. 152, Seventh) was thus violated by the Central of Georgia.[1]

The Engineers' Brotherhood and its General Committee of Adjustment have consistently supported the Central of Georgia in its contention that it had the right to enter into the July 20, 1948, agreement without first notifying the Firemen's Brotherhood that it desired to change the April 19, 1946, agreement.[2]

The Firemen's Brotherhood asked the district court to issue an injunction against the Central of Georgia restraining it from changing the rules and working conditions as contained in the April 19, 1946, agreement until such time as the agreement is modified in a manner consistent with the Railway Labor Act (R. 15), or, in the

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[1] Section 2, Seventh, vests in employees a judicially enforceable right. *Railway Employees' Co-operative Assn. v. Atlanta, B. & C. R. Co.*, 22 F. Supp. 510 (1938); *Burke v. Morphy*, 109 F. 2d 572 (1940), cert. denied, 310 U. S. 635; *Order of Rd. Telegraphers v. Ry. Express Agency*, 321 U. S. 342 (1944); *In re Chicago, N. S. & M. R. Co.*, 147 F. 2d 723 (1945); *Rolfes v. Dwellingham*, 198 F. 2d 591.

[2] This dispute does not involve a jurisdictional dispute between the two brotherhoods such as characterized the litigation in *General Committee of Adjustment, etc. v. Mo.-Kan.-Texas R. Co.*, 320 U. S. 323, and *General Committee of Adjustment, etc. v. Southern Pac. Co.*, 320 U. S. 338.

alternative, that the agreement of April 19, 1946, be rescinded in its entirety (R. 17). The individual plaintiffs also sought judgments against the Central of Georgia for the losses suffered by them as a result of the unlawful change of their rules and working conditions (R. 15).

The Central of Georgia by its answer challenges federal jurisdiction of this action (R. 24-45). The answer on behalf of the Engineers' Brotherhood and its members pleads as a defense that the court "has no jurisdiction of the subject matter of the action." (R. 35).

Anticipating that the issue of jurisdiction would be considered by the district court at pre-trial hearing, the plaintiffs took the deposition, pursuant to stipulation between the parties, of Mr. Walter C. Keiser, vice-chairman and member of the First Division of the National Railroad Adjustment Board, at the offices of the Adjustment Board in Chicago, Illinois. The deposition was duly filed with the clerk of the district court prior to the pre-trial hearing.

The pre-trial hearing was held on December 17, 1951 (R. 48). The jurisdictional issue as raised by the answer on behalf of the Engineers' Brotherhood was considered by the court. After argument was had the court dismissed plaintiffs' complaint (R. 48). The basis of the court's ruling was that a disposition of the case on its merits would require the court to interpret a collective bargaining agreement and this is a subject over which the National Railroad Adjustment Board has exclusive primary jurisdiction (R. 55-69). The order of dismissal was entered December 17, 1951 (R. 48).

The Court of Appeals affirmed the district court's ruling (R. 78). It refused to consider the petitioner's plea and evidence offered in support of it to the effect that the petitioner could not secure an adequate administrative hearing before the Adjustment Board.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.
2. The Court of Appeals has erroneously decided questions of great public importance which affect the rights of employers and substantial numbers of employees, both collectively and individually, in the railway industry.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Fifth Circuit erred:

(1) In holding that the Adjustment Board has exclusive jurisdiction of petitioner's complaint when the interests of the members of the First Division of the Board prevent them from rendering an impartial and disinterested award on the merits of petitioner's grievance.

(2) In sustaining the district court's ruling that it did not have jurisdiction of petitioner's complaint notwith-

standing petitioner could not secure an adequate administrative remedy from the Adjustment Board.

(3) In sustaining the district court's ruling that it did not have jurisdiction of petitioner's complaint notwithstanding petitioner could not secure due process of law from the Adjustment Board.

(4) In sustaining the district court's judgment dismissing petitioner's complaint without hearing petitioner's evidence, consisting of the Keiser deposition, bearing upon the lack of an adequate administrative remedy from the Adjustment Board.

ARGUMENT.

The question that will be presented to this Court for decision if petitioner's petition for writ of certiorari is granted concerns the application of the rule of equity jurisdiction announced by this Court in *Order of Railway Conductors of America v. Pitney, et al.*, 326 U. S. 561, and *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239. The petitioner contends that owing to the alignment of the parties participating in the instant dispute and the relationship of these parties to the members of the First Division of the Adjustment Board, the petitioner will be deprived of property without due process of law, contrary to the Fifth Amendment, if it is denied access to the courts because of the application of the *Pitney* and *Slocum* doctrine.

The personal interest that the members of the First Division have in supporting and maintaining the bargaining positions taken in labor disputes by the organizations or corporations that appoint them to their seats on the First Division, controls their manner of voting on disputes. The record over a period of years of the First Division's methods of deciding claims establishes conclusively that

the petitioner cannot secure an impartial decision on the merits of the instant dispute. The remedy available to the petitioner from the Adjustment Board is not, for this reason, an adequate remedy. It is utterly lacking in impartiality and fairness, the essentials of due process of law.

In a practical sense the objective of the plaintiffs in the instant suit is the enforcement of the collective agreement signed by the petitioner with the Central of Georgia and the Brotherhood of Locomotive Engineers on April 19, 1946. To the plaintiffs' right of action based upon contract law, the Congress has added the injunction contained in Section 2, Seventh, of the Railway Labor Act, reading as follows:

> "No carrier, its officers, or agents, shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act." (45 U. S. C. § 152, Seventh.)

The plaintiffs thus seek by their complaint the enforcement of a clear statutory right to have the collective agreement of April 19, 1946, maintained in effect until such time as it is modified or abrogated by the collective bargaining process.[3]

In order to provide the remedy sought by the plaintiffs it will probably be necessary for the court to first settle the dispute between the parties by interpreting the provisions of one or more collective agreements.

The instant dispute is extraordinary in one respect, to wit, the manner in which the parties to the dispute are aligned.

It not infrequently happens in the railway industry, where close working relations obtain between two crafts of employees, such as between engineers and firemen, con-

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[3] See cases cited *supra*, note 1.

ductors and trainmen, yard conductors and yard brakemen, and clerks and telegraphers, that a dispute will arise in which one labor organization is opposed by a carrier and another labor organization. This is the situation in the instant dispute, and it is this alignment of parties that is a factor of controlling importance when selecting a tribunal for the purpose of submitting the dispute for decision. The Adjustment Board is not an appropriate tribunal for deciding disputes when the disputants are aligned as they are in this case. The reason this is true is disclosed by the Keiser deposition. The facts are as follows.

The carriers are represented on the First Division of the Adjustment Board by five members. They receive their appointments at the hands of a committee representing the carriers of the country as a whole. A carrier member thus represents not one carrier alone but all of the carriers. (45 U. S. C. Sec. 153, First, (b)).

Labor's representatives on the First Division are appointed by the transportation brotherhoods.[4] Each brotherhood appoints a representative on the First Division. Each such appointee is a vice president of the organization that appoints him. (Keiser Deposition, p. 1[illegible], contained in separately printed Appendix, hereafter referred to as "Dep.")

A member of the Adjustment Board receives pay for his services from the "party or parties he is to represent." (45 U. S. C. Sec. 153, First (g)). Each member serves at the pleasure of the organization that appoints him.

The partisan character of the Adjustment Board's membership has been an accepted fact since its inception. It is this characteristic, plus the fact that the members of the Board are appointed by private parties and not by the

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[4] The five transportation brotherhoods are the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America.

Government, that makes the Adjustment Board unique among government tribunals. *The members are expected to vote on the claims that come before them for decision in a manner that will best serve the interests of the party or parties that appoint them.*[5] This is precisely what they do.

In order to bring to the district court at the pre-trial hearing a record that would accurately reflect the First Division's bi-partisan voting practices when deciding claims, the petitioner took the deposition of Mr. Walter C. Keiser, vice-chairman of the First Division, at the offices of the Adjustment Board in Chicago. Mr. Keiser is a vice-president of the petitioner Brotherhood. Two facts of controlling significance are disclosed by Mr. Keiser's testimony. *First*, the carrier members *always* cast their votes as a unit. When casting their votes in deciding a claim they do not exercise an independent will and vote according to their individual judgments on the merits of the claim. They vote in a bloc.[6] Since carrier members represent not

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[5] The fact that the first duty of the labor members on the Adjustment Board is to protect the interests of their respective organizations and the employees these organizations represent, was recognized by the Senate Committee established to investigate the work and procedure of the Adjustment Board and other federal administrative tribunals. The Committee's report on the Adjustment Board appears as Part 4 in "Administrative Procedure in Government Agencies," Senate Document No. 10, 77th Cong., 1st Session. Its pertinent observation in this connection reads as follows:

> "Each labor member of the board represents a particular union. Whenever a case comes up from his union, the labor member is much more vitally interested in that case than he is in cases involving other unions. As a matter of practice the other labor members will normally be guided by the wishes of the labor members whose union is involved. The actual decision, whether it be a decision to sustain or to deny the claim or deadlock, is in effect made on the labor side by one member in most cases. To a lesser extent there is also some division of labor on the carrier's side."

[6] See Mr. Keiser's testimony on this subject in Appendix hereto, pp. a15-a19.

one carrier but the railway system as a whole, this manner of voting is to be expected.

The same is to be said, with one exception, of the voting methods of the labor members.[7] They normally cast their five votes in a bloc, as a unit, when deciding claims (Dep. 24.). The one exception to this practice occurs when the claim to be voted upon involves a three-party dispute in which one labor organization is opposing a carrier and another labor organization. When this is the situation the interest that the labor member takes in the success of the organization he serves as vice-president, and which pays his salary, supersedes his interest in maintaining a united front against the voting power of the carrier members. He naturally votes to support the position taken by his organization, assuming it participated in the dispute on the property (Dep. 40.). The felt necessity of supporting one's own organization compels the labor member appointed by the organization allied with the carrier in the dispute, to break the normal voting bloc maintained by the labor members and to cast his vote in support of his organization's position. He must accordingly align himself with the carrier members. *The inescapable result is that at least six of the ten votes will in every such instance be against the claim, these being the votes of the five carrier members and one labor member* (Dep. 40.).

The labor members, early in the life of the Adjustment Board, felt keenly the necessity of avoiding this split in the labor members' bloc of votes, with the result that on March 7, 1936, they united in a joint request to the chief executives of their respective organizations that henceforth these officers not permit their organizations to submit

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[7] The explanation of the reason labor members customarily vote as a unit in support of labor's interests was epitomized by Mr. Keiser in this statement: "If the labor members don't vote as a unit, they won't be here very long." (Dep. 56.)

claims to the First Division in which two of the organizations had taken opposing positions in the dispute.[8] This request was approved by the chief executives and a conscientious effort made by them to comply with the request (Dep. 31).

The second outstanding fact about the voting record of the members of the First Division is the uniformity with which their votes reflect the interest of the members in the outcome of the disputes. The Keiser deposition and attached Exhibit D (Dep. 85) disclose that of 624 claims disposed of by the First Division during the fiscal year July 1, 1947, to June 30, 1948, *the members cast a tie vote on 528 of these claims, or 84 per cent of the total number.* Their votes were cast on a strictly bi-partisan basis. These 528 claims were, of course, ultimately decided by referees appointed by the National Mediation Board pursuant to Section 3, First (l), of the Railway Labor Act (45 U. S. C. Sec. 153).[9]

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[8] See Appendix, p. a20.

[9] The procedure of the Adjustment Board in this connection is described by Lloyd K. Garrison in "The Railroad Adjustment Board," 46 Yale Law Journal 567, as follows:

> "Each Division being bi-partisan, and the members of each group tending almost always to vote the same way, the unanimous vote of a Division is generally necessary to decide the case. * * *
>
> "When a referee is called in to sit with a division he is given the dockets of the deadlocked cases, consisting of the submissions, the rebuttal statements (if any) and the formal correspondence with the Division. He studies a group of dockets and then sits with the entire Division, generally in a day-long session. The procedure in each case is the same. A labor member of the Division argues the salient points as he sees them. A carrier member replies. * * * Thus the referee, when he is sitting with the Division, is really in the position of a judge with five able advocates on one side and five on the other. The labor members are all vice-presidents of national or international unions, men up from the railroad ranks with long practical experience; the carrier members, for the most part, are men who have had to do with employees' claims back on the roads."

Partisan considerations failed to control the vote of the carrier members in 22 out of the 624 claims disposed of. In resolving these 22 claims the carrier members, voting in a bloc as usual, cast their five votes in support of the claims. The vote of the labor members was, of course, also in support of the 22 claims, so that the resultant vote by the Division was *unanimous* in support of the 22 claims (Dep. 22, 38).[10]

A similar demonstration was given by the labor members. They voted in a bloc against 59 of the 624 claims. Of course, the carrier members also voted against these claims. The result was a *unanimous* vote by the Division against the 59 claims. The failure of the labor members to vote in support of these claims was explained by Mr. Keiser by the statement, "—they were cases where the labor members agreed that the (contract) rules did not support the claims." (Dep. 22..)

This voting record for the fiscal year July 1, 1947, to June 30, 1948, is typical of the First Division's voting methods over a period of years (Dep. 25). It demonstrates with a clarity that makes explanation superfluous that the interest of the carrier members and the labor members in maintaining united and opposing fronts is to them immeasurably more important than are the merits of the claims. *It demonstrates that in all instances, save those comparatively few in which the merit or lack of merit of the claim is patent, the interest of the members in promoting the bargaining success of the party or parties through whom they receive their appointment to the Adjustment Board determines their manner of voting on the claims that come before them for decision.*

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[10] Mr. Keiser explained the carrier's vote sustaining the 22 claims by saying: "—they deal both with discipline cases and time claims, and in those cases the carriers undoubtedly recognized that they were supported by the rules and agreed to a sustaining award without referring them to a referee." (Dep. 22..)

The record shows that the normal or usual types of claims filed with the Adjustment Board are time claims and discipline claims (Dep. 43-). For such claims the Adjustment Board doubtless provides a remedy that meets the requirements of due process of law. Claims of this nature present issues between a carrier and one or more of its employees, the latter being customarily represented by a labor organization. A claim of this nature may, as we have seen, be either sustained or disapproved by a *unanimous* vote of the members of the Division. But in the vast majority of such claims the members of the Division deadlock when voting and the decision is ultimately made by a disinterested party appointed as referee by the National Mediation Board.

An employee has no grounds for complaining regarding the due process of Adjustment Board procedure if the Division deadlocks in voting on his claim, for he is then assured of a decision by an impartial referee. On the other hand, if the decision is unanimous and adverse, it can be said that the employee approached the Adjustment Board with the prospects greatly favoring a deadlocked vote and a final decision by a referee; that he failed to secure this disposition of his claim only because the five members of the Division predisposed in his favor found his claim utterly lacking in merit. Whether or not this represents due process is a question we need not concern ourselves with here.

The prospect of securing an impartial and objective decision on the merits of a claim is non-existent when the parties involved in a dispute are aligned as they are in the instant case. We have seen that the uniform voting practices pursued by the members of the First Division make it certain that the organization standing alone in the dispute has no chance of receiving an impartial decision on

the merits of its claim. Due process of law in even the remotest degree does not exist because of the interest that the members of the Division take in the bargaining success of the organizations that appoint them to their positions and pay their salaries.

The evidence offered to the courts below, but which they declined to consider, shows that the carrier members *always* cast their five votes as a unit. It shows that the labor members also consistently vote as a unit, except when two of the labor organizations are taking opposite sides in a dispute. When this occurs the labor members must vote to support the respective positions taken by their organizations in the dispute (Dep. 40).

If the instant dispute were submitted to the First Division, the carrier members would of necessity vote to support the position maintained by the Central of Georgia in this long-standing dispute. The Engineers' vice president on the First Division would have no choice but to vote to support the position maintained by his organization in this dispute. *This means that six of the ten members of the First Division are committed by their interests to casting their votes in a pre-determined manner, which is to say, against this petitioner.*

The years of consistent voting practices by the members of the Adjustment Board place this result beyond the realm of speculation. Any other result could be achieved only through the action of one or more members violating obligations of loyalty and risking the disaffection of those persons or organizations through whom they received their appointment to the Adjustment Board. These are not the ingredients of due process of law.

To judge by the decisions and observations made by this and other courts on the subject of due process of law, one is entitled to conclude that the condition of impartial-

ity and objectivity maintained by our courts toward the parties and issues that come before them constitutes the bulwark of our democratic judicial system and of the due process of law that characterizes that system. We quote a few typical observations on the subject:

"The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Charta. It is the concern not merely of the immediate litigants. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the Fourteenth Amendment. That is why this Court has outlawed mob domination of a courtroom, Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543, mental coercion of a defendant, Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, a judicial system which does not provide disinterested judges, Tumey v. Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A. L. R. 1243, and discriminatory selection of jurors, Pierre v. Louisiana, 306 U. S. 354, 59 Ct. 536, 83 L. Ed. 757; Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84." [11]

"The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. * * * The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." [12]

"The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts, in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through

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[11] Dissenting opinion, *Bridges v. State of California*, 314 U. S. 252, 282.

[12] *Public Utilities Commission v. Pallak*, 343 U. S. 451, 822.

and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest." [13]

"A concept of judicial administration which leads one to assume that justice can be obtained 'completely and without denial' before a tribunal that is partial, biased, or hostile is certainly one alien to our institutions." [14]

"In determining what rules and forms have been established for the protection of private rights or what safeguards for the protection of individual rights the settled maxims of the law prescribe in such cases as this, we recognize the primal necessity to be laws providing impartial tribunals for the adjudication of rights. * * * *A statute which compels the litigant to submit his controversy to a tribunal of which his adversary is a member makes his antagonist his judge and does not afford due process of law.*"[15] (Italics ours.)

Perhaps the outstanding authority on the subject is the decision of this Court in *Tumey v. Ohio,* 273 U. S. 510. The question presented by this case was stated by Mr. Chief Justice Taft for the Court as follows:

"The question in this case is whether certain statutes of Ohio, in providing for trial by the mayor of a village of one accused of violating the Prohibition Act

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[13] *State ex rel. Barnard v. Board of Education,* 19 Wash. 8, 17, 52 P. 317, 40 L. R. A. 317.

[14] *Peyse v. Lee,* 222 Minn. 269, 24 N. W. 259.

[15] *Commissioners of Union Drainage Dist. No. 1 v. Smith,* 233 Ill. 417, 84 N. E. 376.

of the State, deprive the accused of due process of law and violate the Fourteenth Amendment to the Federal Constitution, because of the pecuniary and other interest which these statutes give the mayor in the result of the trial."

The mayor and other law enforcement agencies shared in the costs collected from persons convicted of violating the prohibition law. The more relevant statements made by this Court on the subject under discussion are the following:

"That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule. * * *

"There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law. * * *

"A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."

The *Tumey* case was, to be sure, a criminal proceeding and personal liberty was at stake. But Constitutional guarantees, including the right to a fair and impartial hearing, are not applicable alone to actions involving personal liberty. This Court, when commenting upon the extent

to which Constitutional guarantees require courts to review stockyard, rate-making decisions by the Secretary of Agriculture, made this statement:

> "It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. *The principle applies when rights either of person or of property are protected by constitutional restrictions.*"[16] (Italics ours.)

We would not be understood as saying that the constitutional protection of property rights goes to the same lengths as the protection extended to life and liberty. But we do assert that the constitutional requirement of a fair hearing by an impartial tribunal is no less applicable to a proceeding involving property interests than to a proceeding in which life or liberty are involved.

Prior to the decisions issued by this Court in the *Pitney* and *Slocum* cases a complaint similar to the complaint filed in the instant suit could have been filed by the Firemen's Brotherhood in any appropriate state or federal court.[17] The Brotherhood's right to a decree compelling the Central of Georgia to observe the requirements of Section 2, Seventh, of the Railway Labor Act by keep-

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[16] *St. Joseph Stock Yards v. U. S.*, 298 U. S. 38.

[17] *Donovan v. Travers*, 285 Mass. 167, 188 N. E. 705 (1934).
Casey v. Bro. of L. F. & E., 197 Minn. 89, 266 N. W. 737 (1935).
L. & N. R. Co. v. Bryant, 263 Ky. 578, 92 S. W. 2d 760 (1935).
Lyons v. St. Joseph Belt Ry., 232 Mo. App. 575, 84 S. W. 2d 933 (1935).
Burton v. O.-W. R. & N. Co., 148 Ore. 648, 38 P. 2d, 72 (1934).
Coley v. Atlantic Coast Line R. Co., 211 N. C. 66, 19 S. E. 2d 124 (1942).
Lewellyn v. Fleming, 154 F. 2d 211 (1946).
Rentschler v. Mo. Pac. R. Co., 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1, (1935) and collection of cases in Note.

ing the agreement of April 19, 1946, in effect until properly modified or terminated would probably not have been challenged on jurisdictional grounds as it has been in the instant suit.

With the advent of the *Pitney* and *Slocum* cases a new doctrine of equity jurisdiction obtains in railway labor law. Its effect is to close the courts to a vast amount of litigation that can be better disposed of by the Adjustment Board. There can be no gainsaying the fact that when the issue is between the carrier and its employees, and the dispute is decided by a referee aided and guided by the experienced and able advocates selected by the members of the Adjustments Board from their own ranks, Adjustment Board jurisdiction does provide advantages not generally to be found in the courts. But this conclusion assumes that the vote of the carrier members and labor members is a deadlock and that the claim reaches a referee for decision. When there is no deadlock because the vote by the members of the Adjustment Board reflects an unbalance among the parties participating in the dispute, Adjustment Board procedure is abortive and there is no semblance of due process of law in the disposition of the dispute.

In neither the *Pitney* nor the *Slocum* cases, nor in *Order of Railway Conductors vs. Southern Railway Co.*, 339 U. S. 255, did the parties question the adequacy of the administrative remedy before the Adjustment Board. The record in these cases, we are entitled to conclude, contained no evidence regarding the established procedure and the voting practices pursued by the members of the Adjustment Board. This Court, when deciding these cases, had no means of knowing what Adjustment Board procedures and practices were, except as they might be disclosed by evidence in the records coming before the Court.

This Court had the right to assume—indeed, it was obliged to assume, until evidence to the contrary was presented, that the established procedure and voting practices of the Board conform to due process of law. And on the basis of this assumption this Court announced a general rule to the effect that railway labor disputes which present questions of contract interpretation are subject to the exclusive jurisdiction of the Adjustment Board.

The evidence offered to the courts below and now before this Court, demonstrates for the first time that Adjustment Board procedure does assure the average claimant an impartial decision on his claim. *But it also demonstrates with equal certainty that in three-party disputes, such as the instant dispute, the votes cast by the members of the Adjustment Board defeat all prospects of an impartial decision because of their individual interests in advantaging the participants to the dispute.*

The courts of this country have demonstrated a zealous observance of the rule that judges must be free of any personal interest in the issues upon which they sit in judgment. This impartiality and absence of personal interest has become the *sine qua non* of due process of law. One may confidently assert that if ten judges comprising a court of law held interests in cases coming before them comparable to the interests felt and asserted by the members of the First Division when a three-party dispute such as is involved in the instant case comes before them for decision, all judicial precedents would be aligned against the court's assumption of jurisdiction because of the absence of due process in the proceeding.

Being compelled to submit the protection of one's rights to a court the majority of whose judges are one's adversaries in interest is clearly foreign to the concept of due process of law as embraced by our Constitutional

system. Equally certain is the fact that it does not lie within the power of Congress to make that which is *not* due process in our constitutional courts, lawful procedure in legislative court established by the Congress.

> "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." [18]

A fortiori this Court may not declare a rule of equity jurisdiction that has the effect of closing the courts to litigants seeking to protect or enforce contract rights, by relegating them to legislative courts or administrative tribunals where due process of law does not obtain.

We believe the doctrine announced by the *Pitney* and *Slocum* decisions deprives this petitioner in the present instance of due process of law and violates the Fifth Amendment; *that this doctrine is violative of due process of law whenever the parties to a railway labor dispute justiciable in nature are so aligned that one or more labor organizations are joined with the carrier in opposition to another labor organization.* Under these circumstances the contract rights and statutory rights of employees should have the protection of the courts where due process of law does obtain.

We respectfully submit that a writ of certiorari should be issued.

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HAROLD C. HEISS,
RUSSELL B. DAY,
Attorneys for Petitioner.

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[18] *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 52.

APPENDIX.

Railway Labor Act, Title I, Sections 2, 3 and 6.

"GENERAL PURPOSES

"SEC. 2. (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually,

or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its em-

ployees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees with-

out interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The willful failure or refusal of any carrier, its officers, or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without

his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

SEC. 3.

"NATIONAL BOARD OF ADJUSTMENT—GRIEVANCES—INTERPRETATION OF AGREEMENTS

"SEC. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board,' the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

"(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under

which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

"(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such repre-

sentative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such board of three shall be final and binding.

"(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be

referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as

are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil

suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

"(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

"(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

"(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

"(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

"(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

"(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited

period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

"SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the

parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Extract from Deposition of Walter C. Keiser.

CROSS EXAMINATION by Mr. Bell.

Q. Mr. Keiser, I have just two or three questions I want to ask you. Your statement that had this jurisdictional dispute come on for hearing before the Board that there would have been a six-four decision against your organization startled me somewhat.

I want to ask you if your Exhibit D does not show conclusively that the Carriers and the Brotherhoods do not always vote together, the Carriers in one block and the Organizations in another block. They don't always vote as a block, do they? A. They always have since I have been on the Board.

Q. Your Exhibit D shows that many awards were made without referees. A. That is right.

Q. Wouldn't that show that they didn't vote as a block? A. No, they voted 100 per cent for the award when it was made.

Q. That would show that the Carriers don't always get on one side and the Organizations on the other,

wouldn't it? A. When they write a denial or sustainer in executive session they are all on one side, yes.

Q. How could you have made any award without referees, that being the case? A. Because on sustains we all voted to sustain and on denials we all voted to deny.

Q. Then you had a deadlock and everything would have gone to a referee? A. No, when we all vote the same way there would have been ten votes for and none against.

Q. In other words, these awards made without referees were cases where all Carrier representatives voted for the awards and all Organization representatives voted for the awards? A. That is right.

Q. That being true, it naturally follows that in some awards then the Carriers and representatives of the Organizations were in accord? A. In the 96 in that first column they were in accord.

Q. Yes. Now, had this jurisdictional question or dispute come on for hearing, might not some of the carriers have sustained your position? A. They never have. They have always voted as a block since I have been on the Board.

Q. Isn't it the duty of the members of the First Division to decide cases on the merits? A. It should be.

Q. That is the duty, isn't it, to decide cases on the merits? A. Well, I think it is, yes.

Q. Then how can you know that you would lose, that your position would not be sustained? Is it because you think there is not any merit in your position? A. No, it is because, as I stated before, in this particular case Mr. Kealey would have to support his Organization, I would have to support mine, and naturally Mr. Kealey would vote with the Carrier members, and it would be six votes

denying the claim to four. If the other labor members voted with me, which we do not know for sure, it would have been six to four.

Q. Why is it compulsory that you support the position of your Organization? If it is your duty to decide claims on the merits, why is it your duty to support your Organization notwithstanding the merits? A. If it is a question of Organization policy, it is my duty. If not, why, I can decide on the merit, but we never disagree on the merit. The labor members and Carriers don't.

Q. You are saying the Carriers always see one side of the merits and the Organizations see the other side? A. That is right. The Carriers always support the railroad.

Q. If there are ten members of the First Division that would hear this dispute, and you all are supposed to decide disputes upon the merits, how can you know how the dispute will be decided in advance of the hearing? A. All we can base our conclusion on is what has happened in the past. They have always voted as a unit.

Q. As a matter of fact, you do not know what the vote would be because the dispute never has been up yet for hearing? A. I know what it would be though even if it hasn't been up because we know what it always has been.

Q. You have said you attempt to decide every question on the merits. A. I said it should be that way.

Q. Do you think there is any merit in your claim or in the claim of your Organization in this case? A. I think there is.

Q. How can you be sure then some of the other Carrier members wouldn't see some merits in it? A. They always support the Carriers.

Q. This question has never been before them? A. No. They never have failed yet.

Q. You do not know what they would do in this case, do you? A. I have a good idea what they would do. I know practically, yes.

Q. Your Exhibit E which you put in is a letter from various representatives of employee organizations to various officers of employee organizations and constitutes an agreement not to bring jurisdictional questions before the Board? Is that what it is substantially? A. I don't say it is an agreement. It is a letter from the labor members of this Division asking the chief executives to refrain from submitting controversial disputes to this Division.

Q. You said in answer to a question put to you by Mr. Day that your Organization, the Firemen, and the Engineers entered into some agreement about jurisdictional disputes. Will you tell us something about that agreement. A. Mr. Johnston and Mr. Robertson had a verbal agreement that jurisdictional matters would be kept away from this Board. I have heard it discussed between them in a number of instances.

Q. And that was a verbal agreement? A. Yes, sir, and they have tried to comply with it. They are today.

Q. And the reason for that agreement is that the employee organizations don't want to be divided on anything before the Board on any question? A. If they are divided, why, the claim can't be disposed of on its merits.

Q. What would prevent on a jurisdictional question before the Board the employee representatives voting together if the Carriers voted together and letting the referee decide the jurisdictional question? What would prevent that happening? A. There is nothing to prevent it. It wouldn't happen though.

Q. It is possible the referee would decide it? A. It wouldn't happen that way because I wouldn't vote to submit a question of principle involving my Organization to a referee.

Q. You would not— A. No.

Q. —leave it to a referee? A. I would get it out of here, if I could.

Q. Based on your knowledge as a member of the First Division of this Board and your experience in railway contracts between railroads and their employees, is it not the purpose of the National Railroad Adjustment Board and your Division to pass on these jurisdictional disputes because you are more experienced in them than the courts would be, that you have more knowledge and experience about the things that arise under these disputes than the courts have? Isn't that the policy and one of the reasons for the Adjustment Board?

The Witness: That question is so long, I would like to have it read.

Mr. Bell: Read it.

(Question read.)

A. The Adjustment Board is not set up to dispose of jurisdictional disputes between two Organizations. It is set up to dispose of disputes between the Organizations and the railroads. There is no provision in the law for jurisdictional matters to come to this Board, disputes between two Organizations.

Mr. Bell: That is all.

Exhibit E to Keiser Deposition.

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
Consumers Building
220 South State St., Chicago, Illinois
Nineteenth Floor

March 7, 1936.

Mr. A. Johnston,
Grand Chief Engineer, B. of L. E.,
1112 B. of L. E. Building,
Cleveland, Ohio.

Mr. D. B. Robertson,
President, B. of L. F. & E.,
318 Keith Building,
Cleveland, Ohio.

Mr. J. A. Phillips,
President, O. R. C.,
O. R. C. Building,
Cedar Rapids, Iowa.

Mr. A. F. Whitney,
President, B. of R. T.,
B. of R. T. Building,
Cleveland, Ohio.

Mr. T. C. Cashen,
President, S. U. of N. A.,
3 Linwood Avenue,
Buffalo, New York.

Dear Sirs and Brothers:

The propriety of submitting jurisdictional disputes to the National Railroad Adjustment Board, First Division, has been a matter of discussion and correspondence by each of the Labor Representatives of the Board with their respective Chief Executive.

Jurisdictional disputes are controversial matters between the Organizations and, in our opinion, should not be submitted to this Board.

The Labor Members as now constituted are a unit in protecting the Contracts of the five Organizations, and we feel that it would be unwise to submit matters of a controversial nature between the Organizations to the Board, which would in any way divide the Labor Group; therefore, we would recommend that all disputes of jurisdictional character now pending before the Board be withdrawn and other methods be adopted for their adjudication.

Yours fraternally,

(Signed) R. E. EDRINGTON
Asst. Grand Chief Engineer, B. L. E.

(Signed) FRED W. LEWIS
Vice President, B. of L. F. & E.

(Signed) G. H. ORAM
Vice President, O. R. C.

(Signed) WM. BISHOP
Vice President, B. of R. T.

(Signed) PAUL M. CARTER
Acting Vice President, S. U. of N. A.

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Office - Supreme Court, U.S.
FILED
JAN 23 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 554

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,
Petitioner,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Motion of Appellant to Withdraw Original Exhibit (Deposition of Walter C. Keiser) for Use in Connection with Petition for Certiorari—Filed November 28, 1952.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13969

Brotherhood of Locomotive Firemen & Enginemen,
Appellant,

vs.

Central of Georgia Railway Company, et al.,
Appellees

Motion to Transit Deposition to Clerk of United States Supreme Court

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Comes now appellant, Brotherhood of Locomotive Firemen & Enginemen, and moves the Court to direct its Clerk to transmit the original deposition of Walter C. Keiser, together with attached exhibits, now on file with said Clerk, to the Clerk of the Supreme Court of the United States, and in support of this motion respectfully shows to the Court the following:

1. The United States District Court for the Northern District of Georgia, Atlanta Division, dismissed appellant's complaint for lack of jurisdiction, being of the opinion that

primary jurisdiction of the cause of action set forth in the complaint was in the National Railroad Adjustment Board.

2. This Court on October 31, 1952, affirmed the judgment of the said District Court.

3. It is the intention of appellant to petition the Supreme Court of the United States for a writ of certiorari in this proceeding.

4. The appellant has contended both in the United States District Court and in this Court that it should not be required to seek redress from the National Railroad Adjustment Board for the reason that that organization would not consider the merits of the case.

5. The opinion of this Court indicates (page 3) that its decision is based upon a consideration of that contention.

In support of that primary contention, appellant took the deposition of Walter C. Keiser, Vice Chairman of the National Railroad Adjustment Board. That deposition was not admitted as evidence by the United States District Court, although appellant so requested, and said deposition apparently remains unopened in the custody of the Clerk of this Court.

6. Appellant intends to urge upon the Supreme Court of the United States that it should not be forced to resort to the National Railroad Adjustment Board for the reasons set forth above, and to urge that the matters set forth in the Keiser deposition support its contention that it could not receive a hearing on the merits by the National Railroad Adjustment Board. Appellant further contends, and has contended throughout this proceeding, that the District Court was in error in refusing to open the Keiser deposition, particularly insofar as the matters therein contained relate to the question of the jurisdiction of the said District Court.

For these reasons, therefore, the Supreme Court ought to have available to it the Keiser deposition in the event that it should decide that the District Court was in error in refusing to examine the contents of that deposition to determine whether or not said District Court had jurisdiction of this cause. The Court is therefore requested to order its Clerk to transmit said unopened deposition as an original

exhibit to the Clerk of the Supreme Court so that it can consider the said deposition if it should so desire.

GAMBRELL, HARLAN, BARWICK,
RUSSELL & SMITH,
/s/ E. SMYTHE GAMBRELL
/s/ W. GLEN HARLAN
/s/ CHARLES A. MOYE, JR.
Attorneys for Appellant.

Certificate of Service

I hereby certify that I have this day mailed a copy of the foregoing motion to counsel for each of the appellees.

/s/ CHARLES A. MOYE, JR.

November 26th, 1952.

ORDER ALLOWING MOTION TO WITHDRAW ORIGINAL EXHIBIT
Filed November 28, 1952

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13969

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,
Appellant,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, ET AL.,
Appellees

ORDER

On consideration of the Motion of Brotherhood of Locomotive Firemen & Enginemen, Appellant in the above entitled and numbered cause:

It is ordered that Appellant be, and it is hereby allowed to withdraw from the records of this Court, for forwarding to the Clerk of the United States Supreme Court for filing in that Court in support of Appellant's petition for writ of certiorari herein, the original sealed deposition of Walter C. Keiser, and Honorable Oakley F. Dodd, Clerk of this Court, is hereby ordered to send to the Clerk of the United States Supreme Court, the said document in its original form for said purpose.

Done at New Orleans, Louisiana, this 28th day of November, A. D., 1952.

/s/ WAYNE G. BORAH,
Judge.

OBJECTION OF APPELLEE, GRAND INTERNATIONAL BROTHERHOOD, ETC., TO MOTION OF APPELLANT TO TRANSMIT DEPOSITION, ETC.—Filed December 9, 1952.

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13969

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,
Appellant,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, ET AL.,
Appellees

STATEMENT OF APPELLEES, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., IN OPPOSITION TO APPELLANT'S MOTION TO TRANSMIT DEPOSITION TO CLERK OF THE UNITED STATES SUPREME COURT.

Now come Grand International Brotherhood of Locomotive Engineers, General Committee of Adjustment of Brotherhood of Locomotive Engineers on the Central of Georgia Railway, H. L. Bishop, Jr., P. C. Davidson, C. L. Cowan, J. A. Vann, J. W. Farr, and C. M. Gober, appellees in the above entitled action, and state herewith their opposition, as hereinafter set forth, to appellant's motion to transmit deposition to the Clerk of the United States Supreme Court.

1. The deposition sought to be transmitted is not part of the record in this case.

2. At pre-trial in the District Court, and after the Court had stated what his ruling on the motion would be, appellant's counsel asked to have the record available on appeal, at which time it was stated:

> "We want to be perfectly sure that we have the deposition available to us on appeal. Would it be permissible for your Honor to go ahead and open the deposition if necessary?"

to which the court stated:

> "No, sir, I am not hearing any evidence on the matter. I am deciding it on the question of jurisdiction. I do not have jurisdiction of the cause."

No offer, except as above stated, to introduce the deposition in evidence was made at pre-trial.

3. Rule 43(c) of the Federal Rules of Civil Procedure, previously cited to this Court by appellant, has no application to the instant situation for the reason that appellant's counsel did not at pre-trial make a specific offer of what he expected to prove by the deposition, nor was any request made upon the trial court to report the evidence in full as required by the provisions of the Rule.

4. Although the deposition was not offered in evidence and no specific offer of what the deposition was expected to prove was made and no request was made to report the evidence in full, the printed record of the transcript of proceedings before the District Court contains argumentative and factual references to the deposition, and appellant is not entitled to more than is contained in the record.

5. Although appellant after pre-trial sought to designate the deposition as part of the record, the District Court declined to include the deposition in the record and ordered the same transmitted to this Court "so that the said Court of Appeals for the Fifth Circuit may, if it deems proper, examine said deposition in connection with points raised by the appeal."

6. Appellant has heretofore filed in this Court a motion to have the deposition together with attached exhibits opened and printed as a part of the record on appeal,

which motion was not granted by the Court, and neither said deposition nor the attached exhibits were opened by this Court or became a part of the record in this case.

7. Rule 38 of the Supreme Court of the United States, in paragraph 7 thereof, provides only for a printing of "the certified transcript of the record", and in paragraph 1 requires that the petition for the writ be "accompanied by a certified transcript of the record in the case." Since the deposition has not heretofore either in the District Court or in this Court been made or considered a part of the record it should not be certified to the Supreme Court.

8. In any event, the motion is premature, as no petition for writ of certiorari has been filed in the Supreme Court of the United States.

Wherefore, it is respectfully submitted that appellant's motion to transmit deposition be denied.

/s/ W. Colquit Carter
/s/ Clarence E. Weisell
Attorneys for Appellees, Grand International Brotherhood of Locomotive Engineers, et al.

Certificate of Service

I hereby certify that on this 8th day of December, 1952, I mailed a copy of the foregoing motion to counsel for appellant and to counsel for appellee, Central of Georgia Railway Company.

/s/ W. Colquit Carter.

OBJECTION OF APPELLEE, CENTRAL OF GEORGIA RAILWAY COMPANY TO MOTION OF APPELLANT TO WITHDRAW ORIGINAL EXHIBIT, ETC.—Filed December 9, 1952

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13969

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,
Appellant,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, ET AL.,
Appellees

Now comes Appellee, Central of Georgia Railway Company, and objects to the allowance of the Brotherhood of Locomotive Firemen and Enginemen's motion to transmit to the Clerk of the United States Supreme Court the depositions of Walter C. Keiser, on the following grounds:

1. The order of the District Court appealed from in this case was entered at a pre-trial hearing when the depositions of Walter C. Keiser were in the possession of the Clerk of the District Court, presumably unopened, and had never been offered in evidence because the case had not come on for trial on its merits. The trial Judge was, therefore, justified in failing to consider them in connection with the question whether the District Court had jurisdiction of the case.

2. On motion of the Appellants, these depositions were sent to the Clerk of this Court. This Appellee does not know whether this Court examined those depositions before

handing down its opinion dated October 31, 1952, but Appellant is mistaken in asserting, in paragraph 5 of the motion to which this objection is filed, that "The opinion of this Court indicates (page 3) that its decision is based upon a consideration of that contention." On page 3 of its opinion this Court said:

> "*The Appellant asserts,* however, that the Federal Court may, in exercising their equitable discretion, assume such jurisdiction upon a showing that the aggrieved party cannot secure an adequate remedy before the Adjustment Board, *and that the facts here so disclose*". (Italics ours).

This is merely a statement of an assertion by the Appellant and is not a statement that the record shows that the Appellant "cannot secure an adequate remedy before the Adjustment Board". On the contrary, this Court's opinion seems to indicate that this Court did not consider those depositions and thought that they were not pertinent because, in the closing paragraph of the opinion, it points out that relief by the Courts would not be necessary until after the Adjustment Board had acted; meaning, as we understand it, that it would be futile to speculate as to whether the Appellants could get a fair hearing before the Adjustment Board or to consider evidence on that subject because the Courts should not be called upon to act until it appeared that the Adjustment Board had failed to comply with the statute.

3. While these depositions were sent up to this Court, they were never a part of the record in the District Court and are not, properly speaking, a part of the record in this Court and, therefore, should not be a part of the record sent to the Supreme Court of the United States and should not be considered by the Supreme Court unless this Court did, in fact, consider them in reaching the conclusion which the Supreme Court will be asked to review.

/s/ A. R. LAWTON
/s/ JAMES N. FRAZER
Attorneys for Appellee,
Central of Georgia Railway Company.

I certify that I have this day mailed a copy of the foregoing document to Counsel for the Appellants.

This December 8, 1952.

/s/ JAMES N. FRAZER

Office of the Clerk

UNITED STATES COURT OF APPEALS

Fifth Circuit

New Orleans 6, La.

Oakley F. Dodd, Clerk

December 15, 1952.

Mr. W. Colquitt Carter
Attorney at law
Atlanta, Georgia
Mr. James Frazer
Attorney at law
Atlanta, Georgia

Gentlemen:

Your letters of December 8th enclosing oppositions to the motion of appellant to transmit deposition to the Supreme Court in re—

> No. 13969. Brotherhood of Locomotive Firemen & Enginemen versus Central of Georgia Railway Company, *et al.*,

was received, and the oppositions filed on December 9th.

On November 28, 1952, Judge Borah signed an order directing that the deposition be sent to the Supreme Court in its original unopened form when the petition for certioari is filed in that Court.

I am directed to say that my certificate will be attached to the deposition in its unopened envelope, certifying that it is being sent to the Supreme Court in connection with the petition for certiorari in the same unopened envelope

that it was before the U. S. District Court and in this Court.

Yours truly,

/s/ OAKLEY F. DODD,
Clerk.

OFD:CO

CC Mr. Charles A. Moye, Jr.

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing 11 pages, numbered from 1 to 11, inclusive, contain a true copy of the (1) Motion to transmit deposition to the Supreme Court; (2) Order allowing Motion and ordering transmittal; (3) Opposition of Appellees, Grand International Brotherhood of Locomotive Engineers, etc., to Motion; (4) Opposition of Appellee, Central of Georgia Railway Company to Motion; (5) Letter of Clerk, U. S. Court of Appeals to counsel for appellees, in the case of Brotherhood of Locomotive Firemen & Enginemen, Appellant, No. 13969, versus Central of Georgia Railway Company, *et al.*, Appellees, as the same remains upon the files and records of said United States Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Court of Appeals, at the City of New Orleans, Louisiana, this 21st day of January, A. D. 1953.

/s/ OAKLEY F. DODD,
Clerk, U. S. Court of Appeals for the Fifth Circuit. (SEAL)

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 3779

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, ET AL.,
Plaintiffs,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
Defendants

Wednesday, April 11, 1951.

DEPOSITION OF WALTER C. KEISER

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 3779

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,
Plaintiffs,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
Defendants.

STIPULATION FOR TAKING OF DEPOSITION OF WALTER C. KEISER

It is hereby stipulated by the parties to this action, acting by their respective attorneys, that the deposition of Walter C. Keiser may be taken before a notary public in and for the County of Cook, State of Illinois, at Suite No. 1311 at 39 South LaSalle Street, in the City of Chicago, State of Illinois, on the 11th day of April, 1951, at 9:00 o'clock in the forenoon of that day, and thereafter from day to day as the taking of the deposition may be adjourned, in relation to the matters and issues involved in the above entitled action, said examination to be by oral questions, and that said witness may produce at the examination records, documents and papers which shall be open to inspection by the representatives of all parties and shall

be subject to all objections under the rules governing the admissibility of evidence.

It is further stipulated and agreed that objections to the form of questions will be waived unless objection is made at the time of taking the deposition, but all objections to the materiality and competency of the testimony and exhibits are reserved to all parties; that the reading and signing of the deposition by the witness may be waived; that the deposition may be read in evidence with the same force and effect as if signed by the witness, and that notice of the filing of the deposition is waived.

/s/ W. GLEN HARLAN,
Attorney for Brotherhood of Locomotive Firemen and Enginemen, R. F. Hooker, and George Ketterbaugh.

/s/ GRIFFIN B. BELL,
Attorney for Central of Georgia Railway Company.

/s/ W. COLQUITT CARTER,
/s/ C. E. WEISELL,
Attorneys for all Defendants other than Central of Georgia Railway Company.

Filing Date: April 11, 1951.

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 3779

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, ET AL., *Plaintiffs,*

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., *Defendants.*

The deposition of Walter C. Keiser taken in the above entitled cause before Frederick Julian, a Notary Public in and for the County of Cook, State of Illinois, at Suite 1311—39 South LaSalle Street, Chicago, Illinois, Wednesday, April 11, 1951, commencing at 10:30 o'clock a.m., of said day, pursuant to the annexed stipulation.

Mr. Charles A. Moye, Jr., and Mr. Russell B. Day, appeared for the plaintiffs; Mr. Griffin Bell, appeared for the Central of Georgia Railway, one of the defendants; Mr. Clarence E. Weisell, appeared for all other defendants.

WALTER C. KEISER, having been first duly sworn according to law, testified as follows:

Direct Examination.

By Mr. Day:

Q. State your name and residence address.
A. Walter C. Keiser, Topeka, Kansas.

Q. What is your present position, Mr. Keiser, and how long have you held it?

A. I am a member of the First Division of the National Railroad Adjustment Board; have held it since April 15, 1948.

Q. Do you hold any particular position with respect to that First Division?

A. I am Vice Chairman at the present time; will be Chairman of the Board the 1st of July of this year. Of the Division, I should say, instead of Board.

Q. Were you ever employed by a railroad company?

A. Yes.

Q. And what railroad was that?

A. The Atchison, Topeka and Santa Fe Railway.

Q. Will you describe briefly your railroad career.

A. I entered the service of the Santa Fe Railroad at Kansas City, Kansas, in May, 1905, as a roundhouse laborer; became a locomotive fireman about the 1st of December, 1905, was promoted to locomotive engineer in January, 1909, and continued in the service until the 1st of May, 1909, when I became General Chairman for the Brotherhood, but I still hold rights as a locomotive engineer on the Santa Fe Railroad.

Q. Are you a member of the Brotherhood of Locomotive Firemen and Enginemen?

A. Yes, sir.

Q. Have you ever held an office in the Firemen's Brotherhood?

A. I was local chairman for my local lodge on the Oklahoma Division; elected in 1907 and continued in that capacity until May, 1909, when I became general chairman for the Eastern and Western lines on that railroad. I continued as general chairman until September 1, 1941, when I became a Vice-President of the Brotherhood and have served in that capacity ever since.

Q. Are you a Vice-President of the Firemen's Brotherhood at the present time?

A. I am.

Q. Then, according to your statement, you have been continuously engaged in either the railway industry as an

employee or as an officer of the Brotherhood for more than 45 years, is that correct?

A. That is correct.

Q. Will you give the names of the other labor members of the First Division and name the organizations which appointed them to their positions.

A. Mr. C. W. Kealey, Assistant Grand Chief of the Brotherhood of Locomotive Engineers, represents that organization. Mr. B. C. Johnson, Vice-President of the Conductors' Brotherhood, represents that organization. Mr. F. W. Coyle, Vice-President of the Brotherhood of Railway Trainmen, represents that Brotherhood. Mr. J. B. Brindley, Vice-President of the Switchmen's Union, represents that organization.

Q. Will you give the names of the carrier members of the First Division and the railroads with which they held positions before being appointed to the First Division.

A. Mr. O. E. Swan, Chairman of the Board, came from the Legal Department of the Kansas, Oklahoma & Gulf and Midland Valley Railroads. Mr. F. L. Green was formerly General Manager of the New York Central Lines. Mr. G. H. Dugan came from the personnel department of the Southern Railway. Mr. H. J. Reeser comes from the personnel department of the Pennsylvania. Mr. H. W. Burtness is the former president of the Chicago and Great Western Railroad.

Q. Will you describe, Mr. Keiser, the usual steps by which a claim is filed with the First Division.

A. A claim is first made by either the individual himself or the local grievance committee and is handled by the local chairman with the Division officers. That usually includes the superintendent, trainmaster or master mechanic or road foreman of engines. If he is unable to satisfactorily dispose of the claim or dispute, it may then be appealed through the general chairman, that is, the chairman of the general grievance committee, to the next higher officer, and appealed by the necessary steps to other higher officers until it is handled with the highest officer designated to handle grievances by the carrier, and if it isn't satisfactorily disposed of then it may be brought by the general chairman to this Division.

Q. Now, will you explain, Mr. Keiser, how a claim is processed after it has been filed with the First Division.

A. Claims may be filed with this Division either joint or *ex parte*. A joint claim is filed jointly by the carrier and the organization involved.

At that time the secretary of this Division is furnished with twelve copies of the submission, the joint submission. One copy is sent by the chairman to his chief executive, and if the chief executive approves the claim it is docketed by the secretary of the Division, given a docket number by the secretary of the Division.

Claims that come in *ex parte*, usually from the employee organization, they are filed in the same way by the chairman. Twelve copies go to the secretary of this Division. One copy at that time is filed with the railroad and a copy sent to the chief executive of the organization for his approval. The carrier then has 30 days in which to file its submission. The employee organization then has 30 days in which to make any reply it cares to to the carrier submission, and that closes the file insofar as written documents are concerned.

The case in either instance if the employees ask for an oral hearing, the case goes in line for oral hearings which are held at least once a year. If they do not ask for oral hearings, it takes its place in line for consideration in executive session.

Before the case comes up in executive session the chairman of the board prepares a list of cases to be considered, and a copy is furnished each member of the Division, with the time they will be considered.

When they come up in executive session they are argued by the labor member who represents the organization having the claim and by some carrier member, and they are disposed of either by a denial of an award or a sustaining award or by being tied. If they are tied, if there is a tie vote, they are then referred to a referee. If they are tied, they are then considered after we have an accumulation of 35 or more—that is the general procedure—again in executive session, and they are deadlocked.

If we cannot agree on a referee,—and we have never

done so on this Division,—the National Mediation Board is called upon to assign a referee to handle that docket of cases.

The referee meets with the Division. He must be appointed within ten days, I believe, under the law. He then meets with the Division, and he is given a portion of the dockets that he is to handle. He takes those dockets and studies them, and when he is ready for argument he advises the chairman of the board or secretary of the board and a time is set to hear argument on that docket of cases or that group of cases from his docket, and at that time the labor representatives, of course, present and defend the case and likewise some carrier members designated do such for the carrier, although we all enter into the general discussion.

After hearing the discussion the referee retires and writes his award, his findings and award. They must be written in his own handwriting, and he comes in before the board and reads his proposed findings and award and, of course, naturally, if it sustains the carrier, why, some carrier members move that it be adopted. If it sustains the contention of the organziation, some organization representative moves that it be adopted, and the referee, voting as a member of the board, votes. As a rule, we vote five one way and five another so far as regular members are concerned, and the referee has the deciding vote. Awards are then printed and sent out.

Q. By the "First Division sitting in executive session," what is meant by that expression?

A. Well, I do not know that I can explain. The members of the board are present and they consider these disputes in executive session and discuss them, and so forth.

Q. By that you mean it is a formal sitting of the First Division to conduct its business as a part of the Adjustment Board?

A. That is correct.

Q. Do you know, Mr. Keiser, whether there is a practice among the labor organizations represented on the First Division of requiring the general chairman to sub-

mit claims to the grand lodge of their respective organizations before filing the claim with the First Division?

A. That is, I think, a requirement of all the organizations. In fact I know it is.

Q. I hand you what has been marked as BLF&E Exhibit A for identification and will ask you to identify that, Mr. Keiser.

A. That is the circular No. 1 issued October 10, 1934, by the National Railroad Adjustment Board dealing with the organization and rules of procedure of the board.

Q. Of the board?

A. Of the board.

Q. I now hand you what has been marked as BLF&E Exhibit B for identification and will ask you to identify that.

A. That is Circular A issued by the First Division of the National Railroad Adjustment Board October 22, 1937, and it deals with procedure in connection with joint submissions to this Division, to the First Division.

Q. I now hand you what has been marked as BLF&E Exhibit C for identification and will ask you to identify that document.

A. This is a document showing the Rules and Rulings Officially Adopted to Govern Proceedings and Conduct of the Business of the First Division of the Adjustment Board whether or not covered in these previous circulars.

Q. Is it correct to say, Mr. Keiser, that Exhibits A, B and C contain the Rules and Regulations governing the filing of claims with the First Division?

A. That is correct.

Q. Do Exhibits A, B and C constitute all of the published rules governing the filing of claims with the First Division?

A. No, there is a Circular B. There is a Circular B issued October 14, 1949, dealing entirely with some changes in the rules governing the submission of *ex parte* submissions.

Q. Is that circular a part of the exhibit designated C?

A. That is correct.

Q. Now, you have explained the manner in which claims

are filed with the First Division and processed by that Division.

Is that procedure, as explained by you, in line with the Rules and Regulations as set forth in Exhibits A, B and C?

A. Yes, sir.

Q. I hand you, Mr. Keiser, a document that has been marked as BLF&E Exhibit D for identification purposes and I will ask you to identify that.

A. This is a tabulation prepared by me from the records of the secretary of the First Division showing cases handled—— Let me correct that to awards made by the Division for a period of three and a half years just previous to January 1, 1951.

It shows the following: The first cross line shows that for the fiscal year of 1948, which covers the period from July 1, 1947, to June 30, 1948, there were 624 awards made by the First Division. Of that number 96 awards were made without a referee. Of those 96, 22 awards sustained the position of the employees and 59 were denial awards and 15 were conditional, compromise, remanded or dismissed. Then it shows there were 528 awards made by the referee. 195 were sustained, 262 denied and 71 were conditional, compromise, remanded or dismissed.

Mr. Weisell: I would like to object to this line of testimony as immaterial and irrelevant. I withdraw the objection until he finishes with his testimony.

Mr. Day:

Q. Proceed.

A. And during that period there were 202 cases that, after having been filed, were withdrawn.

The next column shows the same information for 1949. The fiscal year 1950 includes, in addition to the First Division award, awards by the Supplemental Boards. There were two Supplemental Boards, one for conductors and trainmen and one for engineers and firemen, set up about the 1st of January, 1950,—I think one of them a little before and the other a little after,—so I included those, and they show the information.

The third column shows information for the fiscal year 1950, and the fourth column shows the information for one-half of the fiscal year 1951, from July 1 up to and including December 31st.

Q. Now, looking at the first horizontal column on Exhibit D covering the period from July 1, 1947, to June 30, 1948, the exhibit shows that of the 96 awards made without a referee 22 awards sustained the claim.

Have you any explanation to make as to the character of claims that were involved in that group?

Mr. Weisell: I object to the question.

A. Well, they deal both with discipline cases and time claims, and in those cases the carrier members undoubtedly recognized that they were supported by the rules and agreed to a sustaining award without referring them to a referee.

Mr. Day:

Q. In the next column the exhibit shows that 59 of the 96 awards that were made without a referee, that those 59 were denied.

Will you explain the character of claims, if you know, that constituted that group of 59 in which awards were denied.

A. Those 59 awards covered both discipline cases and time claims, and they were cases where the labor members agreed that the rules did not support the claims.

Q. Does it follow from that that the labor members voted against the award?

A. No, the labor members voted for the denial.

Q. Yes, voted to deny the claim.

A. That is right.

Q. Referring again to the 59 claims in which awards were denied, can you state whether the labor member representing the organization that filed the claim voted against the granting of the award, voted against affirming the claim?

Mr. Weisell: I object to that.

A. Yes.

Mr. Day:

Q. Now, referring to the 15 claims which appear in the column headed "Conditional, Compromise, Remanded, Dismissed," will you explain what those terms mean as used in this exhibit.

A. Well, "conditional" means that if certain statements were the fact the claim was allowed. If the statements by the other party were the fact, the claim was denied. It was conditional on either the facts or whether or not rules were applicable, and so on, and so forth.

"Compromise" might be Claim A, B, C and D. They might allow A and deny B, C and D, or they might allow a portion of any one of the claims and deny the other portions.

"Remanded," usually when a case is remanded it is because the statements of the carrier and the organization are diametrically opposite, and this Board has no way of determining who is telling the truth or who is correct in their statement, and they are usually remanded or sometimes dismissed without prejudice to the contention of either party; in other words, this Division does not make an award, but refers it back by either dismissing it without prejudice or by remanding it.

Q. The term "dismissed," as used in this column, have you explained the meaning of that?

A. Well, that is where there may be a dispute between the two general chairmen. It may be a joint case. It may be a joint case between two general chairmen, or there may be a dispute between the carrier and the general chairman that we are not able to determine from the disputed facts what should be done with it, and we often dismiss it without prejudice, or it may be a claim, as I have in mind one recently where the carrier made—it was a case brought to this Division by the Firemen's Organization, making a claim for a certain number of miles. The Carrier agreed that they were entitled to a lesser number. The Engineers' chairman did not agree with either the Firemen's Organization or the Carrier and he said they were entitled to something else. I decided—it was my case—that the case

wasn't properly set up, and we dismissed it without prejudice.

Q. Now, passing onto the column which indicates that 528 awards were made with a referee, will you explain the action taken with respect to that group of 195 which is classified as "Sustained."

A. Well, I can say that in every one of those cases that the labor members and the referee voted to sustain the awards and the carrier members voted against them.

Q. In the column indicating that 262 claims were denied, what was the action of the Division with respect to that group of cases?

A. In all of those 262 cases the carrier members voted with the referee and the labor members voted against.

Q. In the next column bearing the heading "Conditional, Compromise, Remanded, Dismissed," is the same meaning attached by you to those terms as used in this column as you have previously explained in the column referring to the 15 cases just described?

A. Well, one or the other group, representing labor or the railroads, voted with the referee.

Of course, I can't tell you on the Conditional award, I can't tell you on any of the group, that one group voted always one way and one another, because sometimes an organization votes to accept a Conditional award with the referee and sometimes a railroad does. The same way with the other three headings, the Compromise cases. In very few instances did labor members vote with a referee where cases were remanded or dismissed. There may have been some cases where they did.

Q. Referring to the 202 cases which were withdrawn, what is the action taken when a case is withdrawn?

A. When the carrier or the organization, or jointly, if they are joint cases, advise the secretary that a case is withdrawn, why, it is just removed from our files. We wipe the slate off.

Q. It is given no further consideration by the First Division afterwards?

A. None whatever.

Q. This data disclosed in Exhibit D, Mr. Keiser, was it

prepared from the official records of the First Division that are in the custody of the secretary of that Division?

A. That is correct.

Q. Now, referring to the subsequent three columns for the periods indicated by this Exhibit D, was the data in those subsequent three columns prepared in a similar manner to that explained by you regarding the first column?

A. That is correct.

Q. And the comments which you have made pertaining to the data in the first column are equally applicable to the data appearing in the following three columns?

A. That is right.

Mr. Weisell: I move to strike out all the testimony, questions and answers, with respect to Exhibit D as irrelevant and immaterial to the issues of this case.

Mr. Day:

Q. Are you acquainted, Mr. Keiser, with the dispute between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen General Chairmen on the Central of Georgia Railway and the management of that railway which led to the action entitled "Brotherhood of Locomotive Firemen and Enginemen and others against Central of Georgia Railway Company, Grand International Brotherhood of Locomotive Engineers on the Central of Georgia Railway and others, now pending in the District Court of the United States for the Northern District of Georgia, Atlanta Division?

A. I am.

Q. Describe briefly your understanding of the nature of that dispute.

Mr. Weisell: I want to object to these questions unless Mr. Keiser actually participated and knows these matters first hand. There has been no qualification to show that he knows.

Mr. Day: Strike the question.

Q. Have you examined the pleadings that have been filed in the case just referred to, Mr. Keiser?

A. I have.

Q. Will you describe briefly your understanding of the nature of that dispute.

Mr. Weisell: I object to that.

A. It is a dispute involving the Central of Georgia Railway, the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen with reference to the proper application of an agreement, *tri parte* agreement, made in 1946, April 19th, I believe, involving the rights of enginemen on that property.

Mr. Day:

Q. Do you understand that the dispute involves the assignment rights of engineers and firemen employed on the Central of Georgia Railway?

Mr. Weisell: I object to the form of that question and also to the competency of this witness to testify to it.

A. Yes, sir.

Mr. Day:

Q. State, if you know, Mr. Keiser, the positions taken by the parties in that dispute.

Mr. Weisell: I object to that unless he knows from first hand knowledge.

Mr. Bell: I object to it on the further ground that the pleadings are the best record of what the position of the parties is, and this witness is not competent to testify.

Mr. Weisell: It calls for the conclusion of the witness and an examination of the pleadings.

A. The Brotherhood of Locomotive Firemen and Enginemen is taking the position that the agreement of 1946 is not being complied with because yard engineer fixtures are being exempted from the rule, from the agreement. The agreement provided that——

Mr. Weisell: I object to that.

Mr. Day: Go ahead.

The Witness: ——that in case of a reduction in force that engineers, after exercising their seniority as engineers, and

not being able to hold an assignment out of their terminal, could be returned to firing service without regard to junior engineers working at outside points.

Mr. Weisell: I move to strike out the answer as stating a conclusion of the witness and as incompetent and immaterial.

Mr. Bell: I object to the witness answering any question having to do with the position of the Central of Georgia Railway in this case on the ground that he is incompetent to know the position of the Central of Georgia Railway, and if he is basing his answer on the pleadings the pleadings themselves are the best evidence of what the position of the Central of Georgia Railway is.

Mr. Day:

Q. Will you state, Mr. Keiser, what your understanding is regarding the position of the Firemen's Brotherhood in this controversy involved in the litigation referred to.

Mr. Weisell: I object to it as hearsay.

A. The position of the Firemen's Brotherhood is that the agreement of April 19, 1946, is not being properly complied with.

Mr. Day:

Q. State your understanding, Mr. Keiser, as to the alignment of the three parties in this dispute with respect to the merits of this controversy.

Mr. Weisell: I object to that as incompetent and immaterial, as calling for a conclusion and not the best evidence.

A. The Brotherhood of Locomotive Engineers and the Carrier are taking the position that the agreement is being properly complied with.

Mr. Day:

Q. The position taken by the Firemen's Brotherhood in the dispute is——

A. That the agreement of 1946 is not being properly complied with.

Q. I hand you, Mr. Keiser, a document identified as BLF&E Exhibit E and I will ask you to identify that document, if you can.

A. This is a letter, copy of a letter, written by the labor members of the First Division under date of March 7, 1936, to the chief executives of the five labor organizations coming within the jurisdiction of the First Division dealing with the——

Mr. Weisell: I object to what it deals with. The letter is the best evidence.

Mr. Day:

Q. Go ahead.

A. ——dealing with the question of jurisdictional disputes and advising that they feel that these matters of a controversial nature between the organizations should not be submitted to the First Division for adjudication.

Q. Do you know, Mr. Keiser, from what records Exhibit E was taken?

A. Yes, it comes from the grand lodge records of the Brotherhood of Locomotive Firemen and Enginemen, retained in the office of that Organization in Cleveland, 318 Keith Building.

Q. And the docket number is——

A. 28037.

Q. State, if you know, Mr. Keiser, whether Exhibit E was received by the grand lodge of the Brotherhood of Locomotive Firemen and Enginemen from the labor members of the First Division.

A. It was.

Q. The second paragraph of Exhibit E reads: "Jurisdictional disputes are controversial matters between the Organizations and, in our opinion, should not be submitted to this Board."

Will you define the term, Mr. Keiser, "jurisdictional dispute" as used in Exhibit E and as understood by the labor members of the First Division.

A. It was.

Q. The second paragraph of Exhibit E reads: "Jurisdictional disputes are controversial matters between the Or-

ganizations and, in our opinion, should not be submitted to this Board."

Will you define the term, Mr. Keiser, "jurisdictional dispute" as used in Exhibit E and as understood by the labor members of the First Division.

Mr. Weisell: I object to that as calling for a conclusion. The letter wasn't written by Mr. Keiser nor signed by him. He wasn't a member of the Board at that time. It calls for a conclusion as to what somebody else understood.

A. The term "jurisdictional dispute," as considered by this Division, means any dispute between two or more of the labor organizations a party to this Division. It might be in the nature—— The disputes that brought up this letter deal with the questions of seniority, the application of rules which appear in both contracts, the identical rules, and the question of manning certain kinds of service, hostler service, for example, and matters of that nature.

Mr. Day:

Q. State, Mr. Keiser, whether you understand that the term "jurisdictional dispute" as used in Exhibit E is a dispute in which two organizations are opposed.

A. Yes.

Q. Two labor organizations?

A. That is the dispute this letter refers to.

Q. Is the policy of the present labor members of the Adjustment Board opposing the filing of jurisdictional matters the same as is expressed in Exhibit E by the labor members, the authors of that letter?

A. Yes, sir.

Mr. Weisell: I object to that as to anybody except Mr. Keiser.

Mr. Day:

Q. Mr. Keiser, do you know from your association as a member of the First Division with the other labor members of the First Division what their views are regarding the filing of jurisdictional disputes with the First Division?

A. Yes, I do.

Q. And would you state what that view is.

A. We are opposed to jurisdictional disputes coming to the First Division, and when they do come here, as occasionally one gets through the grand lodges, we attempt to have it withdrawn without being decided by the Division.

Q. Can you state, Mr. Keiser, on the basis of your experience as a member of the First Division and your acquaintance with the records of the First Division what prompted the labor members of the First Division to make the request to the chief executives of the five brotherhoods as contained in Exhibit E?

Mr. Weisell: I object to that as hearsay and as calling for a conclusion on a matter in which he had no part.

A. Because of the partisan nature of the Division, the labor members know that it is impossible to get a dispute decided on its merits where it involves jurisdiction, where one organization is taking one position and another another position.

Mr. Day:

Q. Do you mean by that statement that it would be impossible to get a decision from the First Division or do you mean that a decision could be obtained, but that it would be on some basis other than the merits?

Mr. Weisell: I object to the form of the question as leading.

A. A decision could be secured, but not on the basis of the merits of the claim. The representative of the organization would support the position taken by his organization, with the result that one labor member would be voting with the carrier members, which would mean that the claim would be denied by a vote of six to four.

Mr. Weisell: I move to strike the answer as immaterial and incompetent and as calling for a conclusion with respect to any and all members of the Board, except Mr. Keiser.

Mr. Day:

Q. Do you know whether the request made by the labor members of the First Division to the chief executives in the letter identified as Exhibit E has been complied with by the organizations?

A. Yes, it has.

Q. Do you know, Mr. Keiser, whether an agreement was entered into between Mr. Robertson and Mr. Johnston in compliance with the request made in Exhibit E?

A. Yes, there was.

Q. Will you identify, Mr. Keiser, the persons referred to as Mr. Robertson and Mr. Johnston in the last question.

A. Mr. A. Johnston was grand chief of the Engineers' Division for many years up to—— I can't tell you the date, but about the middle of 1950. Mr. Robertson is the present president of the Brotherhood of Locomotive Firemen and Enginemen and has been since 1922.

Q. You referred in your answer to the Engineers' Division. Do you wish to correct that?

The Witness: Read me my answer, will you, please.

(Answer read.)

A. I meant to say "organization."

Mr. Day:

Q. If notwithstanding the policy of the labor members of the First Division opposing the filing of jurisdictional disputes with the First Division, if such a claim is filed by one of the organizations, is that claim docketed by the secretary and does it follow the usual procedure for the handling of claims?

A. That is correct.

Q. If a claim involving a jurisdictional dispute is submitted by the Firemen's Brotherhood, will you explain how that claim will be handled by you as the representative of the Firemen's Brotherhood on the First Division and what happens to that claim when it comes up for consideration by the First Division sitting in executive session.

Mr. Bell: I object to that question on the ground it is unduly repetitious.

A. The first knowledge I have of the claim is when I receive a list of claims to be considered in executive session.

If I discover that there is a question of jurisdiction, if it involves my organization and the Trainmen I contact the representative of the Trainmen. If it involves my organization and the Brotherhood of Locomotive Engineers, I contact the representative of the Engineers, and if we determine that it is of a jurisdictional nature, when it comes up in executive session I ask that it be passed without action. In our rules of procedure we provide that any member of the Board may pass a docket if he isn't ready to discuss it.

I then follow up with a letter to the general chairman of the railroad, with a copy to my chief executive, calling attention to the fact that this case is of a jurisdictional nature and I ask him to withdraw it from the Board.

Mr. Bell: I withdraw my last objection.

Mr. Day:

Q. In making that request to the general chairman on the railroad, what general chairman do you refer to, Mr. Keiser?

A. The general chairman who filed the claim.

Q. Would that be the general chairman representing the Firemen's Brotherhood?

A. Oh, yes.

Q. Now, is the method which you have described of handling a firemen's claim which involved a dispute with another Brotherhood, is that a uniform method of handling claims that is followed by each of the labor members of the First Division when a similar claim is filed by their organization with the First Division?

A. It is.

Q. When you explained that when a claim filed by the Firemen's Brotherhood of a jurisdictional nature comes up for consideration before the First Division when sitting in executive session, and that claim is passed by you, will you explain what you mean by passing the case?

A. It isn't given consideration at that time. It is just simply passed over and listed on a later list, if it is not withdrawn.

Q. Is there any limitation on the number of times that a

member of the First Division can request the passing of a claim?

A. There is not.

Q. Will you state whether you know of any instance in the course of your experience as a member of the First Division in which a claim involving a dispute between two Brotherhoods was not handled in the manner which has been described by you.

A. No, I know of no instance.

Q. If a claim involving a dispute between two Brotherhoods was not passed when it came up for consideration by the First Division sitting in executive session, and was allowed to go to decision, can you state what would be the outcome of that procedure?

Mr. Weisell: I object to that as calling for a conclusion.

A. In that case one labor member would vote with the carrier members and, of course, the claim would be denied.

Mr. Day:

Q. Why do you say it would be denied?

A. Because there are five carrier members and five labor members, and the carrier members always vote as a unit, and they vote to sustain the carrier, and one of the organizations would be taking the same position, and their representative would vote with the carrier members.

Q. And the vote would then be decided how?

A. On a six to four vote and, of course, the claim would be lost.

Q. Can you say whether that division of votes by the members of the First Division would be cast without regard to the merits of the claim?

Mr. Weisell: I object to that as calling for a conclusion.

A. The officer on the Board would naturally support his organization and, of course, he would vote against sustaining the claim, and it would be lost, of course.

Mr. Day:

Q. Now, do you know whether there are at the present time claims pending before the First Division involving disputes between two Brotherhoods which are being handled in the manner that you have described?

A. Yes, there are.

Q. Can you give the docket numbers of those claims and state the nature of the disputes involved in those claims?

A. Yes, I made a memorandum here.

There are four cases from the Southern Railroad brought here by the B. of R. T. They are dockets 26150, 26151, 26152 and 26153. They involve requests that yardmen be employed at a number of points on the Southern Railway to pilot light engines moving between roundhouses and stations and yards where the work is now being done and has been done for 40 or 50 years by hostlers and hostler helpers.

There are two similar cases from the GM&O that the Trainmen have in here. They are dockets 25146 and 25445.

Then there are three similar disputes brought here by the Switchmen's Union on the D&RG Railroad involving the same questions.

There are two dockets here from the Union Pacific, Eastern territory, involving the same question. They are docket numbers 26176 and 26278.

Mr. Weisell:

Q. What organizations are involved in those last?

A. The trainmen and firemen.

Q. In all of these cases?

A. No, the Switchmen's Union in the D&RG.

Then there is a case at the present time from the Reading Railroad involving the Firemen and the Brotherhood of Locomotive Engineers. It is a Firemen's case. It is docket number 23895.

Mr. Day:

Q. Can you state, Mr. Keiser, whether the claims made by the Trainmen or Switchmen in the cases referred to in-

volve disputes regarding the interpretation or application of existing agreements?

A. Yes, in all of these Trainmen and Switchmen cases it involves the handling of engines by hostler and hostler helpers. The Trainmen are contending that the work of handling the switches in making these movements is yard work, and the Switchmen are making the same contention and that they should be manned by the yardmen, while I have contended that we protected those jobs for from 25 to 50 years and that we should not now be supplanted by another organization, and they have all been passed, all of them that have come up. One or two of them have not come up for consideration yet in executive session, but Mr. Coyle and I have discussed them all.

The Reading case was brought to the Division by the Firemen's Brotherhood, and in that case the Engineers are relying on a rule in their contract and the Firemen are relying on a different rule in their contract. It has to do with protecting emergency engineers.

Q. Do you know whether the claims being made by the Trainmen or Switchmen for the right to pilot these locomotives are being made under the terms of their collective agreements?

A. They say that they are.

Q. What has been the handling of these claims to the present time? How have they been handled?

A. They have been docketed with the Division, and most of them—not all of them—have been listed for consideration in executive session, and Mr. Coyle and Mr. Brindley have asked that they be passed. Mr. Coyle and I have said that we will refer the entire matter to the two chief executives, but we haven't done so yet.

Q. Do you know whether any action has been taken by the labor members of the First Division whose organization filed these claims to secure their withdrawal?

A. I don't know what action the officers have taken, other than that they have passed them and I understand have written their chief executives relative to what they should do about them.

Q. Have you indicated to the labor members of these

organizations what your attitude is or will be if the cases are allowed to come up for decision by the First Division sitting in executive session?

A. I have told them that I cannot support the claims.

Q. Meaning what?

A. That I can't vote to sustain them.

Q. And if you did not vote to sustain them, what would be the final vote of the First Division?

A. I would vote with the carrier members to deny the claim.

Q. You referred, Mr. Keiser, to the claim docketed as No. 23895, involving a dispute of a jurisdictional nature between the Engineer's Brotherhood as now pending before the First Division.

Will you state what procedural steps have been taken in the processing of that claim?

A. That claim, I wrote the general chairman on the Reading Railroad and suggested that because of the nature of the claim that it be withdrawn. I filed a copy with my International president. The general chairman in reply sent me a letter, a copy of a letter he had written, asking the managment to join him in withdrawing the case. That is as far as I know about it.

Q. Has that claim come up for consideration by the First Division sitting in executive session?

A. Yes, and has been passed twice.

Q. Have you discussed this claim with the Engineers' representative on the First Division?

A. I have discussed it with Mr. Kealey.

Q. I hand you a document which has been marked BLF&E Exhibit F for identification. Will you identify that, please.

A. That is a copy of a letter I wrote to General Chairman Graeff of the Reading Railroad under date of March 8, 1951.

Q. Was that letter written by you in your official capacity as a member of the First Division of the Adjustment Board?

A. It was.

Q. Now, referring to the controversy between the Firemen's Brotherhood and the Engineers' Brotherhood and the Central of Georgia Railway involved in the case for which this deposition is being taken, is it or is it not true

that had that controversy been submitted by the Firemen's Brotherhood to the Adjustment Board for decision there would have been an automatic decision against the Firemen's Brotherhood without any regard for the merits of the claim, and, if so, why?

Mr. Bell: I object to that.

Mr. Weisell: I object.

Mr. Bell: I object to that on the ground it calls for a conclusion because this witness is only one of ten persons who would vote on the claim.

Mr. Weisell: I object to it as calling for a conclusion on the part of the witness as to how all ten members of the Board would vote or as to how a majority at least of the ten members would vote.

The Witness: Will you read that question, please.

(Question read.)

A. The merits of the claim would not have entered into it. Mr. Kealey, representing the Engineers, would have voted to support his organization. The railroad representatives would support the railroad. I, as a representative of the BLF&E would support the claim, and we know that there would have been at least six votes to deny the claim.

Mr. Weisell: I move to strike out the answer as stating a conclusion of the witness.

Mr. Day:

Q. Can you state that the result of that voting, as you have explained it, would have resulted in an automatic decision?

Mr. Weisell: I object to that for the same reason.

A. It would have.

Mr. Day:

Q. And that decision would have been what?

A. A denial of the claim.

Mr. Day: That is all of our direct questions, and I now make a formal offer in evidence of BLF&E Exhibits designated A to F, inclusive.

(BLF&E Exhibits A to F, both inclusive, are returned herewith.)

Mr. Bell: The stipulation as to the taking of the deposition of this witness provides that all objections to the materiality and competency of the testimony and exhibits are reserved to all parties. Therefore, I object to all the testimony of this witness having to do with the practice and procedure and customs before the First Division of the Railway Adjustment Board on the ground that they are irrelevant and immaterial.

I also object to all questions and answers having to do with the instant case on the ground that the answers are hearsay, are based on hearsay, and that the witness is incompetent to answer questions concerning the instant case.

And I object to the questions and answers pertaining to what the probable Board decision would have been had the dispute in the instant case come on for hearing before the Board on the ground that the answers constitute conclusions of the witness. This objection is to the testimony and to Exhibits A through F.

And I object to the testimony of this witness on the further ground that it is in the nature of a self-serving declaration and is put in solely in an attempt to give jurisdiction to the Court to hear this case.

Mr. Weisell: I have made an objection to a number of these as we have gone along, but I would like to join in the objections made by Mr. Bell, and with respect to Exhibit F I would like to make the further objection that it is not competent and has no probative value as to the matters therein set forth and should be limited solely to the showing of what Mr. Keiser did or would do rather than to establish the truth of the matters therein set forth.

Cross-examination.

By Mr. Bell:

Q. Mr. Keiser, I have just two or three questions I want to ask you.

Your statement that had this jurisdictional dispute come on for hearing before the Board that there would have been a six-four decision against your organization startled me somewhat.

I want to ask you if your Exhibit D does not show conclusively that the Carriers and the Brotherhoods do not always vote together, the Carriers in one block and the Organizations in another block. They don't always vote as a block, do they?

A. They always have since I have been on the Board.

Q. Your Exhibit D shows that many awards were made without referees.

A. That is right.

Q. Wouldn't that show that they didn't vote as a block?

A. No, they voted 100 per cent for the award when it was made.

Q. That would show that the Carriers don't always get on one side and the Organizations on the other, wouldn't it?

A. When they write a denial or sustainer in executive session they are all on one side, yes.

Q. How could you have made any award without referees, that being the case?

A. Because on sustains we all voted to sustain and on denials we all voted to deny.

Q. Then you had a deadlock and everything would have gone to a referee?

A. No, when we all vote the same way there would have been ten votes for and none against.

Q. In other words, these awards made without referees were cases where all Carrier representatives voted for the awards and all Organization representatives voted for the awards?

A. That is right.

Q. That being true, it naturally follows that in some

awards then the Carriers and representatives of the Organizations were in accord?

A. In the 96 in that first column they were in accord.

Q. Yes. Now, had this jurisdictional question or dispute come on for hearing, might not some of the carriers have sustained your position?

A. They never have. They have always voted as a block since I have been on the Board.

Q. Isn't it the duty of the members of the First Division to decide cases on the merits?

A. It should be.

Q. That is the duty, isn't it, to decide cases on the merits?

A. Well, I think it is, yes.

Q. Then how can you know that you would lose, that your position would not be sustained? Is it because you think there is not any merit in your position?

A. No, it is because, as I stated before, in this particular case Mr. Kealey would have to support his Organization, I would have to support mine, and naturally Mr. Kealey would vote with the Carrier members, and it would be six votes denying the claim to four. If the other labor members voted with me, which we do not know for sure, it would have been six to four.

Q. Why is it compulsory that you support the position of your Organization? If it is your duty to decide claims on the merits, why is it your duty to support your Organization notwithstanding the merits?

A. If it is a question of Organization policy, it is my duty. If not, why, I can decide on the merit, but we never disagree on the merit. The labor members and Carriers don't.

Q. You are saying the Carriers always see one side of the merits and the Organizations see the other side?

A. That is right. The Carriers always support the railroad.

Q. If there are ten members of the First Division that would hear this dispute, and you all are supposed to decide disputes upon the merits, how can you know how the dispute will be decided in advance of the hearing?

A. All we can base our conclusions on is what has happened in the past. They have always voted as a unit.

Q. As a matter of fact, you do not know what the vote would be because the dispute never has been up yet for hearing?

A. I know what it would be though even if it hasn't been up because we know what it always has been.

Q. You have said you attempt to decide every question on the merits.

A. I said it should be that way.

Q. Do you think there is any merit in your claim or in the claim of your Organization in this case?

A. I think there is.

Q. How can you be sure then some of the other Carrier members wouldn't see some merits in it?

A. They always support the Carriers.

Q. This question has never been before them?

A. No. They never have failed yet.

Q. You do not know what they would do in this case, do you?

A. I have a good idea what they would do. I know practically, yes.

Q. Your Exhibit E which you put in is a letter from various representatives of employee organizations to various officers of employee organizations and constitutes an agreement not to bring jurisdictional questions before the Board? Is that what it is substantially?

A. I don't say it is an agreement. It is a letter from the labor members of this Division asking the chief executives to refrain from submitting controversial disputes to this Division.

Q. You said in answer to a question put to you by Mr. Day that your Organization, the Firemen, and the Engineers entered into some agreement about jurisdictional disputes. Will you tell us something about that agreement.

A. Mr. Johnston and Mr. Robertson had a verbal agreement that jurisdictional matters would be kept away from this Board. I have heard it discussed between them in a number of instances.

Q. And that was a verbal agreement?

A. Yes, sir, and they have tried to comply with it. They are today.

Q. And the reason for that agreement is that the employee organizations don't want to be divided on anything before the Board on any question?

A. If they are divided, why, the claim can't be disposed of on its merits.

Q. What would prevent on a jurisdictional question before the Board the employee representatives voting together if the Carriers voted together and letting the referee decide the jurisdictional question? What would prevent that happening?

A. There is nothing to prevent it. It wouldn't happen though.

Q. It is possible the referee would decide it?

A. It wouldn't happen that way because I wouldn't vote to submit a question of principle involving my Organization to a referee.

Q. You would not——

A. No.

Q. ——leave it to a referee?

A. I would get it out of here, if I could.

Q. Based on your knowledge as a member of the First Division of this Board and your experience in railway contracts between railroads and their employees, is it not the purpose of the National Railroad Adjustment Board and your Division to pass on these jurisdictional disputes because you are more experienced in them than the courts would be, that you have more knowledge and experience about the things that arise under these disputes than the courts have? Isn't that the policy and one of the reasons for the Adjustment Board?

The Witness: That question is so long, I would like to have it read.

Mr. Bell: Read it.

(Question read.)

A. The Adjustment Board is not set up to dispose of jurisdictional disputes between two Organizations. It is set up to dispose of disputes between the Organizations and the railroads. There is no provision in the law for jurisdictional

matters to come to this Board, disputes between two Organizations.

Mr. Bell: That is all.

Cross-examination.

By Mr. Weisell:

Q. You say the Board is set up for the purpose of deciding disputes between the Organizations and the railroads.

A. That is right.

Q. Is it set up for the purpose of deciding also, if that be correct what you said, disputes between employees and the railroads?

A. I presume it is, yes.

Q. Well, an employee under the law has the right to appear before the Board and present a dispute to you himself, hasn't he?

A. That is right.

Q. And the Organizations, when they come in with claims, they are handling claims of employees for the employees, are they not?

A. Correct.

Q. And the Board allows the claims to the employees, doesn't it, if it sustains the claim?

A. It does.

Q. It allows the claims of some employees?

A. It does.

Q. The Organizations don't have many claims against the Organizations for violation of rules, do they?

A. The Organizations file claims here, but they are not filed by representative——

Q. As representative of the individual?

A. Not necessarily.

Q. Generally isn't it true, Mr. Keiser, that the type of claim which comes before your Board involves time claims or discipline claims of individuals, individual employees, isn't that correct?

A. That is the general proposition, yes.

Q. And in most of those cases—perhaps all—I don't know—but in most of them at least it is true that the employees'

Organization represents him in the handling of his claim, isn't that right?

A. Not necessarily. That is the general rule, yes. The individual makes the claim and the Organization handles it for him, but the Organization can also file claims and does file claims.

Q. What kind of claims would the Organization file?

A. The Organization files claims for—— They may file a claim for one individual and they say "all subsequent dates," or "men performing similar service on subsequent dates."

Q. In any event aren't they representing the individuals who have the claims? They don't get any money for themselves, do they?

A. Presumably they are representing the individual.

Q. Yes. Now, with reference to Exhibit D, Mr. Keiser, the time covered by this Exhibit which you have prepared, 1948 to December 31, 1950, covers a period of time during which you were a member of the Board, doesn't it?

A. Yes, it covers all the period I was a member of the Board.

Q. And when did you become a member of the Board?

A. I became a member of the Board in April, 1948.

Q. Are these figures which you have in Exhibit D the same figures which are shown in the annual reports of the Adjustment Board as printed in the annual report of the Mediation Board?

A. The figures as to the number of awards made are. The other report of the National Mediation Board doesn't break them down like I have broken them down. Let me qualify that. That last six months' period, that isn't covered by the Mediation Board reports.

Q. That has not been published yet, has it?

A. No.

Q. Now, the Supplemental Boards, what are they?

A. Well, they are Boards set up supplementing this Board, with the same authority this Board has for the handling of disputes.

Q. And how many members do they have?

A. Each Supplemental Board has four members.

Q. You mean two Carrier——

A. Two Carrier and two Labor.

Q. You are not a member of the Supplemental Board, are you?

A. No.

Q. What is your familiarity with each and every case that has been handled by the Supplemental Boards?

A. The record shows whether they were sustained or denied and with or without a referee.

Q. But they do not show what the vote was, do they?

A. No record shows what the vote was on either the First Division or the Supplemental Board.

Q. But I understand you to have testified that since you were on the Board you know what the vote is on the Board because you are there.

A. I know what it is on the Supplemental Board, too, because I am in daily contact with our representative on the Supplemental Board.

Q. Somebody tells you about that. You don't sit on the Supplemental Board, do you?

A. I don't sit on the Supplemental Board, no.

Q. And what you know about their decisions is what somebody tells you?

A. No, what I know about the decision is what their record shows.

Q. As to the result, but as to who voted and how, you either have to guess or take what somebody tells you?

A. I know because I am told how they vote.

Q. But you don't have the information because you were there?

A. No, I wasn't there. I was not there.

Q. No. Now, Mr. Keiser, with reference to your Exhibit F, your letter dated March 8, 1951, concerning the claim of Engineer Lawrence N. Harty, that you say is a claim arising on the Reading Railroad?

A. That is right.

Q. Did I understand you correctly to say that you had discussed this matter with Mr. Kealey?

A. Yes.

Q. When did you do that?

A. I can't tell you when. It was before I wrote the letter to Mr. Graeff.

Q. And what was the nature of the discussion?

A. We just discussed the nature of the claim; that it involved the interpretation of rules and that the chairmen had disagreed on it, and I told Mr. Kealey I was writing our chairman asking him to withdraw the claim.

Q. Is that substantially the whole of your discussion?

A. Yes, it is. That was just about all. We discuss many claims that might be controversial and decide some of them are and some of them aren't. Mr. Kealey has withdrawn claims the same as I have.

Q. Do you know, Mr. Keiser, whether any of the claims listed in your Exhibit D as having been disposed of one way or the other by the Board and the Supplemental Boards, do you know whether any of those claims involved what you have called jurisdictional disputes?

A. I don't think they did. None of them on the First Division did, and I am satisfied that none of them did on the Supplemental Board because they follow the same procedure we do down there.

Q. But you are basing your statement, are you, simply on the general situation that they follow the same procedure that you do?

A. I have discussed it with our representative on that Board. I know that they do.

Q. You know they follow the same procedure?

A. The same procedure.

Q. Now, do you state positively that none of the cases disposed of prior to December 31, 1950, covered in your Exhibit D involved jurisdictional disputes?

A. I can.

Q. Do you know, Mr. Keiser, whether there was ever any communication in writing from the chief executives in answer to or commenting upon your Exhibit E?

A. I do not know about anybody but our chief. Our chief acknowledged it.

Q. He acknowledged it?

A. Yes.

Q. And did I understand you to say that there was a

verbal agreement between Mr. Robertson and Mr. Johnston concerning the request here?

A. That is right.

Q. How do you know about that?

A. I know that because I have sat in a number of conferences when these matters were discussed and I know that they were agreed on that subject.

Q. When both Mr. Johnston and Mr. Robertson were present?

A. That is right.

Q. Where did those take place?

A. In Cleveland and in Washington.

Q. Before or after you came on the Board?

A. Before.

Q. This letter, Exhibit E, did you personally remove this from the files of the Brotherhood of Locomotive Firemen and Enginemen?

A. I didn't personally remove it, but it came out of that file. I saw it in that file.

Q. You saw it in the file?

A. Yes, sir.

Q. It says "Received Richmond." Who is that?

A. He was assistant chief clerk in our office in Cleveland.

Q. Now, the document, Exhibit C, consisting of excerpts apparently from the minutes—— I haven't had an opportunity to look through it and I do not know how many pages there are—— According to my count, it consists of 26 pages. What is this document? I don't mean its contents. I mean is this a document which you have prepared personally or is this a publication of the Board?

A. This was prepared by the secretary of the Division.

Q. When?

A. I don't know when the first portion of it was prepared by him, but that is where it came from. I asked him to have it brought up to date recently, and the pages are not numbered, but——

Q. Well, is this a document that was originally prepared at your instance?

A. Not at my instance. It was brought up to date at my instance. It was prepared and in the files of every officer of

this Board up to and including the entry on page 4, February 12, 1943, and I asked him to bring it up to date, and he did, or his office did, but it wasn't prepared by me.

Q. And what is the part that is in the files of every member of the Board? Just the first four pages?

A. Down to and including, yes—— not the first four. I do not know why they have it numbered as it is, the pages listed as they are, but there is a section of six pages and then there is a section of four more. There were ten pages. They were in my file and I am sure in the file of other officers of the Board up to and including February 12, 1943.

Q. February 12, 1943?

A. Yes, page 4 of the second group here.

Q. Then beginning with the unnumbered page following the pages just referred to and headed "Excerpt from minutes May 24, 1944," the rest of it is what was brought up to date at your request?

A. That is right.

Q. And was that prepared solely by the secretary or did you tell him what you wanted put in there?

A. No, I didn't tell him. I asked him to bring it up to date, any actions of the Board since the last.

Q. When did you make that request, Mr. Keiser, to have it brought up to date?

A. Oh, about ten days ago when I knew I was going to be asked to make a deposition in this case.

Q. Without having the opportunity at the moment to look through this document page by page, are there any articles there in this extended matter that you have had added to it or that you requested be added to it which deal with the subject of jurisdictional disputes particularly?

A. I don't think so.

Q. These relate generally, don't they, to the handling of any and all claims that come before the Board?

A. Yes. There is one exception at least. The entry on page 4, October 24, 1935, deals only with the Engineers and Firemen, action taken at the request of Mr. Johnston, Chief Engineer, and Mr. Robertson, President of the Firemen.

Q. The document, Exhibit A, contains the rules of the

entire Board, as adopted by the entire Board, and relates to all divisions?

A. That is correct.

Q. In addition to those rules are there special rules that the divisions adopt or are all rules adopted by the Board?

A. This Division adopted Circular A and Circular B of this Board. It is recognized that each Division has the right to make their rules of procedure.

Q. You say the statute so provides?

A. I say it is recognized. I do not know what the statutes provide. I think so though.

Mr. Weisell: That is all.

Further Cross-examination.

By Mr. Bell:

Q. Mr. Keiser, you stated to Mr. Day you were familiar with the pleadings in this case.

A. I have read them.

Q. You know that two of the plaintiffs—one is R. F. Hooker and George Ketterbaugh is the other one—allege that they are entitled to damages because of this alleged violation of the contract. You are familiar with that fact?

A. I see it in the pleadings.

Q. Now, if either one of these gentlemen, Mr. Hooker or Mr. Ketterbaugh, had filed a claim in the normal manner, following the contract, he could have had his claim brought here to this Board, could he not?

A. It probably would have come to this Board, but I imagine Kealey and I would have gotten it out of here.

Q. But it could have come to the Board in that manner——

A. It could have come to the Board.

Q. ——had they followed the contract insofar as presentment of the claim is concerned?

A. I see it is alleged they didn't follow the contract. I didn't see the file on their individual claim. I do not know whether they did or did not.

Q. But it would be necessary for them to follow the contract.

A. I would assume so.

Q. And if they had it would have come to this Board and this Board would have had it before them?

A. It could have been docketed with this Board, yes.

Q. It would have been docketed?

A. Yes.

Mr. Bell: That is all.

Further Cross-examination.

By Mr. Weisell:

Q. Mr. Keiser, how do you know the other Organizations follow the same procedure that you have outlined for the withdrawal of these so-called juisdictional claims? Do they send you copies of letters when they write them to their chief executives and their general chairmen?

A. I do not know what they do with reference to writing their executives and general chairmen, and I never said so. I said they pass them and then make some attempt to get them removed from the docket. I do not know whether they follow the same procedure that I do. I couldn't testify to that.

Q. The procedure which you say they do follow and which you say you are familiar with is up to the point of passing?

A. They have the cases withdrawn.

Q. What about these B of RT cases you referred to? Have they been withdrawn?

A. No, they haven't.

Q. How long since they came up?

A. Oh, I guess it has been six or eight months since they first came up. They have been coming up from time to time, but they have all been passed, all that have come up.

Mr. Weisell: I think that is all I have.

Redirect Examination.

By Mr. Day:

Q. Mr. Keiser, what claims go to a referee for his participation in their disposition?

A. Those where the Board ties.

Q. You mean by that vote five to five?

A. They vote five to five and those cases go to a referee.

Q. In view of the established practice of handling claims involving jurisdictional disputes that are filed with the First Division, will you state whether it is possible for such a claim to be submitted to a referee for decision?

Mr. Weisell: I object to that.

Mr. Bell: He has already answered it once. I object to it, too.

A. I do not know just what you mean by "possible." It would be possible if we let it go, but we don't. We don't let it go to the Board. We get it out of here.

Mr. Day:

Q. In view of your previous testimony that only claims on which the Board is deadlocked do go to a referee, is it possible for a claim involving a jurisdictional dispute to ever go to a referee?

A. I would say that it was not possible.

Mr. Weisell: I move to strike out the answer.

Mr. Day:

Q. Now, Mr. Keiser, are you so positive of the manner in which the members of the First Division would vote if the controversy involved in this litigation were to be submitted to the Board that you would seek to get the case withdrawn and prevent it from being submitted to the Board even though you were completely satisfied that the case had merit?

A. I would get the case withdrawn if I possibly could because I know it wouldn't be decided on its merits.

Q. You are perfectly positive of that so that your action would be to get the case withdrawn, is that right?

A. That is right.

Q. Now, referring to the Supplemental Board, can you give the names of the Carrier and Labor Members of the Board and indicate the companies or organizations from which they came?

A. Well, the Enginemen's Supplemental Board, Assistant Grand Chief Southworth represents the Brotherhood of Locomotive Engineers and alternate Vice-President Miller represents the Brotherhood of Locomotive Firemen and Enginemen. The Carrier representative, they have one permanent member, Mr. Hoglund from the Burlington. The additional Carrier member comes from the property where the claim comes from, but it is understood he is not to be the official who actively handled the case on the property.

Mr. Bell: I move that question and answer be stricken on the ground it is irrelevant and immaterial to the case at hand.

The Witness: (Continuing) And on the Conductors' and Trainmen's Supplemental Board the Conductors' representative is Mr. McGill, a Vice-President of the ORC, and the Trainmen's representative is Richard Brennan. I think he carries the title of Deputy President of the B of RT. I can't call the Carrier Member, an Erie man. The Carrier representative, the permanent member, is the personnel man from the Erie Railroad, but I can't tell you his name. Then the other representative comes from the Carrier from which the claim arises.

Mr. Day:

Q. Are the members of the Supplemental Boards paid by the companies, compensated by the companies or organizations that appoint them, in the same manner as are the members of the First Division?

A. They are paid the same way.

Q. You spoke of Mr. Miller as the representative of the Firemen's Brotherhood on the Supplemental Board. Is he an officer of that organization?

A. Yes, he is. He was elected an alternate Vice-President.

Q. So that both you and Mr. Miller are at the present time and have been during your tenures on the First Division and the Supplemental Board officers of the Firemen's Brotherhood?

A. That is correct.

Q. Which one of the Supplemental Boards would this controversy involved in the litigation for which this depo-

sition is taken—if it were submitted as a claim, to which Supplemental Board would it go for submission?

A. It would go to the Engineers and Firemen's Supplemental Board.

Q. Now, directing your attention to the claims now pending before the First Division that involve disputes of a so-called jurisdictional nature between the Trainmen's Organization and the Firemen's Organization, has Mr. Coyle indicated to you whether he has taken or is taking steps to have those claims withdrawn?

A. He has told me that he has written Mr. Kennedy, President of the Trainmen's Brotherhood, about them.

Q. Do you understand from what he told you that the object of that communication to Mr. Kennedy was to induce Mr. Kennedy to have the claims withdrawn?

A. I think he had that in mind; either that or that Kennedy and Robertson get together and decide what to do with it.

Mr. Bell: I object to that last answer on the ground it is obvious he doesn't know what the man had in his mind.

Mr. Day: That is all, but I think the record should show that the Brotherhood of Locomotive Engineers' representative on the First Division was present at the deposition during the time that the witness was being cross examined by Mr. Weisell. Is that all right?

Mr. Weisell: I haven't any objection.

Mr. Day: That is all I have.

Mr. Weisell: Are you objecting to his presence?

Mr. Day: Oh, no, not at all.

Recross-examination.

By Mr. Bell:

Q. Mr. Keiser, the fact that other employee organizations have filed claims involving jurisdictional disputes before the First Division of the Board would indicate that they have a desire to have the Board decide jurisdictional disputes, is that true?

A. The fact that other organizations have?

Q. Yes.

A. I wouldn't say that it did.

Q. But your Organization doesn't wish to put that jurisdictional dispute before the Board in this case?

A. The law doesn't provide for jurisdictional disputes to come to this Division.

Q. You had considerable to say about the merits of the case. Do you believe that any side except yours has any merit?

A. That what?

Q. That the other side from your side has merit?

A. Well, if I didn't I wouldn't vote to deny some of these claims.

Q. Why are you not willing to risk a jurisdictional dispute on the merits then and let the ten members of the First Division of the Board decide it?

A. This Board wasn't set up to decide disputes between organizations. It was set up to decide disputes between Carriers and employees.

Q. Doesn't this case involve a Carrier and employees?

A. It also involves a dispute between Organizations.

Q. It basically involves a dispute between the plaintiffs Ketterbaugh and Hooker and the Central of Georgia Railway, doesn't it?

A. Apparently it does. I haven't studied the dockets of those two cases other than the reference to them in your court documents.

Q. And the jurisdictional question only comes into the case by virtue of their claim against the Central of Georgia Railway, is that true?

A. I think the jurisdictional question would come into it in connection with their claims also.

Q. That is what I meant. You and I thought the same way.

And you answered my question on cross examination that it would be possible for a jurisdictional dispute to go to a referee, but you just told Mr. Day it would not be possible. Can you explain the discrepancy in your answers?

A. There was no discrepancy. The question was under the procedure followed by the Labor Members of the Board would it be possible and I said no.

Q. In answer to my question you said it would be possible.
A. If we deviated from the procedure we have been following it would be possible, yes.
Q. But you wouldn't be willing to have a referee decide this case?
A. No, the law doesn't provide for a referee to decide jurisdictional disputes.
Q. But, if it did, you wouldn't be willing?
A. I am not saying.

Mr. Bell: That is all.

Recross-examination.

By Mr. Weisell:

Q. Mr. Keiser, do you know how this dispute arose?
A. I know what the statements in the court documents say as to how it arose.
Q. But beyond that you do not know?
A. I have no knowledge other than what appears in the record.

Mr. Weisell: That is all.

Redirect Examination.

By Mr. Day:

Q. If when a claim comes up for consideration by the First Division sitting in executive session one of the Labor Members of that Division votes with the Carrier representative in disposing of the claim on the merits, does not that prevent the case from reaching a referee?
A. Oh, yes.
Q. So that in view of the established policy of the Labor Members of the Board, as explained by you, to vote to sustain their Organization's position when a jurisdictional dispute is involved in a claim, does it follow or would it follow that such a claim when submitted to the First Division would be disposed of without going to a referee?
A. That is correct.

Mr. Bell:

Q. Your answer is based on the premise that the five carrier members would disregard the merit and vote together, isn't it?

A. My reply is based on the premise they would vote as a unit, as they always do.

Q. And that the other three representatives of the employee organizations, that is, the three other than the two involved in the dispute, would agree with your side on the merits and vote with you?

A. If it was a four against vote, yes. They might not vote with me, but I think they would. They might not.

Mr. Weisell:

Q. If they thought the other side had merit they might vote with them, is that true, Mr. Keiser?

A. They could.

Q. In other words, you say they might vote with you because you know you are right?

A. If the Labor Members don't vote as a unit, they won't *he* here very long.

Q. When you have said, Mr. Keiser, that one of these disputes, if it came to a vote before the Board, would not be decided on its merit, do you mean, in line with what you have said, that it would be voted upon without giving any consideration to the facts?

A. I presume it would be discussed, but the Labor Member, where it is a jurisdictional dispute, one of the Labor Members would vote with the Carrier.

Q. And would give no consideration to the merits?

A. He may have a different viewpoint as to the merits than I do . Labor Members don't always agree, but we always agree when it comes to a vote on the Board.

Q. What I am trying to get at is what you mean when you say it wouldn't be decided on its merits?

A. I mean regardless of the merits of the case that the claim would be denied because one member would vote with the Carrier Members or vote to sustain the Carrier, so it would be denied.

Mr. Bell: I object to that answer on the ground it is a conclusion of the witness.

Mr. Weisell: That is all.

Mr. Day: That is all.

UNITED STATES OF AMERICA,
State of Illinois,

County of Cook, ss:

I, Frederick Julian, a Notary Public in and for the State and County aforesaid, do hereby certify that on the 11th day of April, 1951, at Suite 1311, 39 South LaSalle Street, in the City of Chicago, County of Cook, State of Illinois, pursuant to the attached Stipulation and for use in the cause pending in the District Court of the United States for the Northern District of Georgia, Atlanta Division, wherein the Brotherhood of Locomotive Firemen and Enginemen, R. F. Hooker, and George Ketterbaugh are plaintiffs, and Central of Georgia Railway Company, Grand International Brotherhood of Locomotive Engineers, General Committee of Adjustment of the Brotherhood of Locomotive Engineers on the Central of Georgia, T. A. Hollingsworth, General Chairman, H. L. Bishop, Jr., Vice Chairman, H. E. Himes, C. L. Cowan, H. L. Stephens, J. W. Farr and C. M. Gober, are defendants, personally appeared, between the hours of 10:30 o'clock in the forenoon and 2:30 o'clock in the afternoon, the witness named in said Stipulation, and Russell B. Day and Charles A. Moye, Jr., appearing for plaintiffs, and Griffin Bell appearing for Central of Georgia Railway Company, and Clarence E. Weisell appearing for all other named defendants, and the said Walter C. Keiser, being by me first duly cautioned and sworn to testify the whole truth concerning the matters in controversy, and being examined, deposed and said as in the foregoing annexed deposition set out.

I hereby certify that said deposition was begun on the 11th day of April, 1951, and was completed on the same day.

I hereby certify that the several exhibits attached to said deposition were offered in evidence and marked for identification as is set out in said deposition.

I further certify that the said deposition was then and there taken stenographically and transcribed under my

direction and in my presence; that the reading and the signing of the deposition by the said witness was waived by stipulation of counsel for all parties, and the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of the District Court as required by law.

I further certify that I am not a relative or employee or counsel or attorney to any of the parties, or a relative or employee of such counsel or attorney, nor am I financially interested in the event of the cause.

I further certify that the fee for taking said deposition, the sum of $101.65, has been paid to me by the defendants and the same is just and reasonable.

Witness my hand and official seal at Chicago, Illinois, this 30th day of April, 1951.

FREDERICK JULIAN,
Notary Public.

(SEAL)

Circular No. 1

(Issued October 10, 1934)

NATIONAL RAILROAD ADJUSTMENT BOARD

Organization and Certain Rules of Procedure

Headquarters, Chicago, Illinois

MEMBERSHIP

National Railroad Adjustment Board

Macy Nicholson, Chairman

D. W. Helt, Vice-Chairman

First Division

Macy Nicholson, Chairman
William Bishop, Vice-Chairman
Walter G. Abriel
T. J. Bissett
D. H. Bremerman
W. C. Hudson
Fred W. Lewis
John Lundergan
G. H. Oram
M. F. Rolfe
T. S. McFarland, Secretary

Second Division

J. A. Anderson, Chairman
Harry J. Carr, Vice-Chairman
George H. Dugan
M. W. Hassett
F. H. Knight
Charles J. MacGowan
C. E. Peck
A. G. Walther
L. M. Wicklein
George Wright
J. L. Mindling, Secretary

Third Division

L. L. McDonald, Chairman
D. W. Helt, Vice-Chairman
R. H. Allison
C. C. Cook
F. F. Cowley
E. W. Fowler
A. H. Jones
W. J. Potts
A. F. Stout
J. H. Sylvester
H. A. Johnson, Secretary

Fourth Division

A. J. Hancock, Chairman
J. J. Noonan, Vice-Chairman
C. W. Deal
E. I. Ford
E. J. Hamner
Charles M. Sheplar
R. B. Parkhurst, Secretary

General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Organization

The National Railroad Adjustment Board was organized as of July 31, 1934, in accordance with the provisions of the Railway Labor Act, approved June 21, 1934. The said Adjustment Board is composed of four Divisions, whose proceedings shall be independent of one another. The First, Second and Third Divisions thereof are each composed of ten Members, and the Fourth Division thereof is composed of six Members.

Classes of Disputes

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this act (June 21, 1934), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.

Jurisdiction

First Division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

Second Division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers.

Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees.

Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions.

Form of Submission

Parties: All parties to the dispute must be stated in each submission.

Statement of Claim: Under this caption the petitioner or petitioners must clearly state the particular question upon which an award is desired.

Statement of Facts: In a "Joint Statement of Facts," if possible, briefly, but fully set forth the controlling facts involved. In event of inability to agree upon a "Joint Statement of Facts," then each party shall show separately the facts as they respectively believe them to be.

Position of Employees: Under this caption the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

Position of Carrier: Under this caption the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

Signatures: All submissions must be signed by the parties submitting the same.

Ex Parte Submission: In event of an *ex parte* submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an *ex parte* submission on a certain date (thirty days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.

General

To conserve time and expedite proceedings all parties within the scope of the Adjustment Board should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions.

All submissions shall be typewritten or machine prepared, addressed to the Secretary of the appropriate Division of the Adjustment Board, and fifteen copies thereof filed by the petitioner or petitioners.

Parties to a dispute are required to state in all submissions whether or not an oral hearing is desired.

Hearings

Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.

Appearances

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.

Awards

All awards of the Adjustment Board shall be signed by order of the appropriate Division thereof and shall be attested by the signature of its Secretary, as indicated thus:

"NATIONAL RAILROAD ADJUSTMENT BOARD,
By Order of.....Division
ATTEST: .....
Secretary."

By order of

NATIONAL RAILROAD ADJUSTMENT BOARD.
Macy Nicholson, Chairman,
D. W. Helt, Vice-Chairman.
B

FIRST DIVISION

1908 Consumers Building

220 South State St., Chicago, Illinois

T. S. McFarland, Secretary

R. E. Edrington,
Chairman
Wm. Bishop
Paul M. Carter
T. K. Faherty
E. W. Fowler

L. L. McDonald,
Vice Chairman
R. A. Knoff
Fred W. Lewis
L. O. Murdock
G. H. Oram

October 22, 1937.

Circular A

(Joint Submissions)

To the Representatives of the Carriers and the Employees Subject to the Jurisdiction of the First Division:

Your attention is directed to the following rules contained in Circular No. 1, issued by the National Railroad Adjustment Board on October 10, 1934, governing the preparation of submissions, reading as follows:

> "Position of Employees: Under this caption the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute."
>
> "Position of Carrier: Under this caption the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute."

which clearly show that:

(1)—The representatives of the parties must in their respective positions, clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and

(2)—All data submitted in support of their respective positions must affirmatively show the same to have been presented to the other party and made a part of the particular question in dispute.

The rules above cited are not being observed by all parties in the preparation of submissions. Data, exhibits and

argumentative facts are being withheld and presented at the hearing in the form of a written argumentative statement amounting to an evasion of said rules, which rules were designed to require a compliance with the law, conserve time, expedite the proceedings, and thus obviate the need of lengthy briefs and unnecessary oral discussion.

The Railway Labor Act places upon the members of the Division the responsibility for making an award upon disputes WHEN PROPERLY SUBMITTED to the Division, and it is necessary that the representatives of the carriers and employees, parties to the disputes, first discharge their responsibility for preparation of submissions in accordance with rules adopted by the Division. The Division will continue to enforce a compliance with its rules governing the preparation of submissions, and will not, unless jointly requested by the parties, accept any written matter offered subsequent to the filing of the original submission or at the hearing which, under the rules, should have been made a part of the record in the original submission. Any other prepared memoranda intended for submission at an oral hearing must be restricted to an explanation of matter contained in the record, and copies thereof must be exchanged between the parties prior to the date of hearing.

FIRST DIVISION—

NATIONAL RAILROAD ADJUSTMENT BOARD

R. E. EDRINGTON, *Chairman.*

L. L. MCDONALD, *Vice-Chairman.*

C

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

Rules and Rulings Officially Adopted to Govern Proceedings and Conduct of the Business of the First Division of the Adjustment Board.

Minutes:

Executive Hours

Nov. 7, 1934—"It was decided upon motion made that the Board would meet from 10:00 A.M. to 12:30 P.M., and 2:00 P.M. to 4:30 P.M., Monday to Friday, inclusive."

Rules of Conduct

Dec. 3, 1934—"The question of rules of procedure was discussed and the following rules were adopted:

(1)—No member will ask a leading question.

(2)—There will be no argument permitted between the parties; nor argument by members of the Board with either party appearing.

(3)—In hearings the parties will be permitted to submit case in full, without any interruption whatever by questions from any member, after which Chairman by specific designations will give members opportunity in successive order to ask questions. No subsequent questions will be asked by members except by addressing other members while asking questions.

(4)—The Chair is authorized to enforce these rules in hearings, subject only to consideration in later executive session if desired, in order to clarify the intent of the procedure herein set forth."

Jurisdictional Questions Raised

(When to be decided)

Dec. 3, 1934—"The question of granting a hearing on the matter of jurisdiction of the Board in *ex parte* cases, at the request of the Management, was discussed and the Secretary directed to make reply to the affect that the submissions should be sent to the Board by the Management, and that the question of jurisdiction will be decided at the time of the hearing."

(2)

Discipline Records

Dec. 13, 1934—"Upon motion made and duly seconded, it was decided that in sending out decisions in discipline cases, only the claim and findings of the Board will be published."

Withdrawals

May 11, 1935—"It was decided that it would not be necessary to issue an award or to send out any information generally as to the withdrawal of cases."

Withdrawals

Nov. 1, 1937—"The question of chief executives of the organizations and officers of the carriers outranking those who sign the submissions having the privilege of withdrawing cases from the docket of the Board, was discussed, and it was the concensus of opinion that this practice and privilege should be extended to them."

Withdrawals

Sept. 9, 1938—"It was regularly moved and unanimously adopted that once a carrier and committee have established a standing on the docket calendar of this Division, the withdrawal of a case or cases, except that all are withdrawn, will not have the effect of changing their relative standing on the docket calendar as compared to other groups of cases thereon."

Ex Parte Submissions

(Later revised)

June 18, 1935—"Upon motion regularly made and seconded, the following Resolution was adopted:

'It is agreed by the members of the First Division that in handling of *Ex Parte* Submissions, from this date, June 18th, 1935, until January 1st, 1936, the following method will be adopted as a matter of trial and without change in the present rule of handling of *Ex Parte* Submissions, except as follows:

'When the submissions of both parties to this dispute have been received by the Secretary of the First Division, he will immediately furnish each of the parties to the dispute with the submission of the other party, in order that they may be properly prepared to answer all phases of the dispute when hearing is held:

Ex Parte Submissions. (Later revised)

"This arrangement to be used for the guidance of the First Division and to remain in that body and cease on January 1st, 1936, unless extended by the majority vote of the First Division."

Ex Parte Submissions. (Later Revised)

Jan. 31, 1936—"The following resolution was adopted with respect to *ex parte* submissions:

Moved that the resolution adopted on June 18, 1935, with respect to *ex parte* submissions, that is to say, the mailing of the employees' submission to the management, and of the management's submission to the committees be and the same is hereby continued in effect until February 1, 1937, and that the Secretary of the Division incorporate in each such letter of transmittal the following specific language:

This case is assumed to be complete, and nothing will be added to it prior to the date of the hearing thereof. However, at the direction of the Board, we are sending to the Management a copy of the Employees' submission, and to the General Chairman a copy of the Management's submission.

This is being done in order that both the Management and the Committee may have an opportunity to study the submissions prior to date set for hearings information as to which will be given to you later.

It should be understood, however, that any argument presented to the Board at the hearing should be confined to matters incorporated in the submissions."

Ex Parte Submissions.

June 29, 1938—"The following resolution was unanimously adopted, making re-effective the resolution adopted June 18, 1935, with respect to *ex parte* submissions:

'Resolved that the resolution adopted June 18, 1935, with respect to *ex parte* submissions regarding the mailing of the employees' submission to the Management, and of the management's submission to the committees, be and the

same is hereby continued in effect until July 1, 1939, on which date the arrangement terminates unless extended by a majority vote of the full membership of the First Division; and that the Secretary of the Division incorporate in each such letter of transmittal the following specific language.

" 'This case is assumed to be complete and nothing will be added thereto prior to the date of hearing thereon. It should be understood, however, that any argument presented to the Division at the hearing will be confined to matters incorporated in the submissions, and introduction of evidence at the hearing is foreclosed.

If argument is prepared in the form of written brief, copies thereof shall be exchanged between the parties prior to the date of hearing.

At the direction of the Division, I am sending to the management copy of the employees' submission, and to the general chairman a copy of the management's submission. This is being done in order that both parties may have an opportunity to study the submissions prior to the date set for hearing.' "

Interpretation of Agreement Rules by the Parties Thereto.

Oct. 24, 1935—"Request was received from Messrs. Johnston and Robertson, Chief Executives, respectively, of the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, for the adoption by the Board of the arrangement which was put into effect on the Eastern Board and, perhaps, other Regional Boards with respect to cases submitted by one Organization under a rule of another Organization to the effect that an interpretation would be requested by the Board of the Organization which is party to the schedule of which the rule is a part.

This arrangement was made effective, and the Chairman wrote Messrs. Johnston and Robertson, which letter was approved by the Board, as follows:

"Receipt is respectfully acknowledged of your letter of the 10th instant and copy of the Agreement enclosed there-

with which was reached between the Managements of the Railroads and the Chief Executives of the B. of L. E., B. of L.F. & E., O.R.C. and B.R.T—parties to the Train Service Board of Adjustment (Eastern), providing that any Organization party to the Agreement might submit cases to the Board, but the Board, before hearing the case, should request the Organization holding the schedule on the particular road to advise the Board promptly of its interpretation of the rule involved

'You state that it is the desire of the B. of L.E. and the B. of L. F. & E. that the same arrangement be made effective and the cases handled accordingly by this Division.

'It is the desire of the Board to cooperate in this matter and the arrangement is being made effective. However, it is hoped that the interpretations, when necessary, will be obtained and made a part of the papers in the cases before they are submitted to the Board.' "

Circular A—Joint Submissions

Oct. 22, 1937—"Circular A concerning joint submissions, a copy of which is attached hereto and made a part of these minutes, was unanimously adopted."

Stenographic Notes

Aug. 1, 1938—"In a short executive session at 2 P.M., from which the parties to the hearing were excused, it was determined that in keeping with previous rulings of the Division as to procedure, no stenographic notes could be taken of the meeting other than what the Carrier itself might present, which might be recorded by the Carrier's reporter, if one was present."

Attendance Record.

Feb. 6, 1939—"It was regularly moved and seconded that record of members present or members absent will be kept only as and when directed by the chairman and vice chairman of the Division. Motion carried."

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

Rules and Rulings Officially Adopted to Govern Proceedings and Conduct of the Business of the First Division of the Adjustment Board

Referees

Minutes

July 17, 1939—"The Chairman outlined as probable procedure to be followed with respect to referees' assignments that:

(1)—The cases would be given the onceover by the referee.

(2)—At his discretion they would be discussed with the Members in executive session when awards might or might not be rendered, and that the referee would more than likely retire and make a further study of the cases in the light of discussions had.

(3)—He would later advise the Secretary when awards were ready, as near as may be in the order listed."

Notice Letters

Jan. 26, 1940—"It is understood that the Secretary will, when asking the other party cited in a notice letter to file submissions in accordance with the notice letter, furnish a full statement of the claims as furnished in the notice letter, or send with the request a copy of the notice letter. It is further understood that in order to expedite the handling of the matter, the Secretary is authorized to arrange through the chief executives and the several railroad bureaus, including the Short Line Railroad Association, for notice letters to be furnished in duplicate."

Feb. 29, 1940—"Mr. Edrington mentioned the practice of some of the general chairmen holding up cases for accumulation before sending notices of intention to file claims with the Division and expressed the thought that notice letters should not be held in abeyance for accumulation but should be sent in promptly in order that the carriers may not be burdened with answering a great many submissions at one time, and thereby avoid some of the re-

quests for extensions of time for the filing of their submissions, which thought was generally concurred in by other Members.

"After general discusion it was the concensus of opinion that the chairman and vice chairman write the general managers and chief executives with a view to improvement in that respect."

(See copy of letter attached.)

Referees

Mar. 26, 1940—"At the direction of the Division, the Chairman wrote Mr. Otto S. Beyer, Chairman of the National Mediation Board, stating that it is the belief of the First Division that 'the Act does not contemplate the Adjustment Board furnishing to the Mediation Board a list of names of those individuals who have been considered in formal session by the members of the Division, which side nominated such individuals, and which side voted affirmatively for their appointment.'

Ex Parte Submissions Exchanged

"At the direction of the Division the Secretary wrote a joint letter to Messrs. Appleton, White, Higginbottom and Symes, general managers of the New York Central, Eastern and Western Regions, respectively, of the Pennsylvania Railroad, advising that their understanding of our letter of March 6th is correct, i.e., that under the rules of procedure of the Division they will not be furnished copies of *ex parte* submissions of the employees prior to the completion of the cases and the assignment of docket numbers thereto."

Hearings

Oct. 4, 1940—With respect to the following procedural rule:

Hearings

Oct. 4, 1940—'Any other prepared memoranda intended for submission at an oral hearing must be restricted to an

explanation of matter contained in the record, and copies thereof must be exchanged between the parties prior to the date of hearing.'

"Following ruling is made:

"The term *'date of hearing'* is held to mean the single date on which hearing has been set down upon a docket or group of dockets, and that it does not mean that such supplemental papers are admissible in the record if exchanged on any date subsequent thereto, even though a particular docket or dockets in the group may not be reached for actual hearing until a subsequent date."

Minutes

Oct. 29, 1940—"A discussion was had with respect to the question of reading the minutes daily to the Division, but no action was taken except that the members were of the unanimous opinion that they should be given copies of the minutes wherein are incorporated any important actions taken by the Division, which is to be done."

Waiver of Oral Hearings

Feb. 6, 1941—"It was suggested by Mr. Lewis and acquiesced in by Mr. Fowler and others that a circular letter be written advising all concerned of their right to waive oral hearings on dockets.

Certified Copy of Record

"The Chairman read letter from Mr. G. R. McKee asking for copy of record in the Metcalfe case (Docket 6160). The Secretary was directed to and did reply to his letter advising him that the record might be obtained from either party to the case and that in the event request was made by either party the record would be furnished."

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Chicago, Illinois

February 12, 1941

Mr. A. Johnston, Grand Chief Engineer,
Brotherhood of Locomotive Engineers
Cleveland, Ohio
Mr. J. A. Phillips, President
Order of Railway Conductors
Cedar Rapids, Iowa
Mr. D. B. Robertson, President
Bro. of Loco. Firemen & Enginemen
Cleveland, Ohio
Mr. A. F. Whitney, President,
Brotherhood of Railroad Trainmen
Cleveland, Ohio
Mr. T. C. Cashen, International President,
Switchmen's Union of North America,
Buffalo, New York
Mr. H. E. Jones, Executive Secretary,
Bureau of Information of the Eastern Railways,
New York, N. Y.
Mr. E. Murrin, Executive Secretary,
The Association of Western Railways
Chicago, Illinois
Mr. A. J. Bier, Manager,
Bureau of Information of the Southeastern Railways
Washington, D. C.
Mr. J. M. Hood, President,
American Short Line RR Association
Washington, D. C.

Gentlemen:

From the nature of certain inquiries received from time to time, it would seem that not all parties concerned fully understand the existing policy of the First Division with respect to handling given cases on which oral hearings shall have been waived by all parties to the docket file.

It should be observed from Circular No. 1, reprinted February 1, 1939, that oral hearings are not contemplated unless requested by the parties, or either of them. When an oral hearing be not requested by any of the parties, or specifically waived by all parties to a given docket, the record in such case or cases becomes immediately available for the making of an award.

It should, therefore, be obvious that if and whenever the parties shall thus avail themselves of that policy, they may secure an award far in advance (perhaps two or three years) of the time that an award could otherwise be made, since it has been also the policy of the Division to set cases down for hearing in the order in which received from each of the different railroads, there being at the present time a total of 4,650 cases awaiting attention of the Division, involving some 136 different railroads.

Not only may new cases be submitted on the record, without oral hearing, and be thus advanced for an award, but any or all of the total of 4,650 cases already pending in the records of the Division may receive like treatment upon joint notice of the parties to each separate docket, of their desire now to waive oral hearing.

In this connection, attention should also be called to the resolution adopted by the First Division with respect to *ex parte* submissions, wherein the Secretary be required to mail simultaneously to the respective parties a copy of the other's submission, together with the following advice:

> "This case is assumed to be complete and nothing will be added thereto prior to the date of hearing thereon. It should be understood, however, that any argument presented to the Division at the hearing will be confined to matters incorporated in the submissions, and introduction of evidence at the hearing is foreclosed.
>
> "If argument is prepared in form of written brief, copies thereof shall be exchanged between the parties prior to the date of hearing.
>
> "At the direction of the Division I am sending to the management a copy of the employees' submission,

and to the General Chairman a copy of the management's submission. This is being done in order that both parties may have an opportunity to study the submissions prior to the date set for hearing."

The aforequoted resolution (which will expire on June 30, 1941, unless longer extended by formal action of the Division), will apply with equal force to supplemental papers which the parties to a given docket or dockets may desire to file concurrently with notice of desire to waive oral hearing, and if conforming thereto the same will be received for addition to the record.

Will you kindly bring the foregoing to the attention of all those interested.

Yours very truly,
(Sgd) E. W. Fowler
Chairman
(Sgd) Fred W. Lewis
Vice Chairman

Separating Protest and Claim for Compensation

Jan. 13, 1942—"The following is quoted from the findings in Award 6334, Docket 5559 (Referee H. A. Johnson):

"This Division hereby definitely adopts the rule that controversies are not divisible and may not be brought to it separately as protest and claim for compensation.

"However, in view of the prior lack of a definite rule to that effect and since the record of Docket 1901 shows some reference in the statement of Position of Committee to 'time claimed,' though no such claim was included with the protest, the Division considers that the application of the rule to the present claim would be unduly harsh and prefers merely to announce it for application to claims hereafter finally submitted for decision."

Hours of Service

Feb. 12, 1943—"The following directions were given the Secretary by the Division, effective February 15:

'The hours of service of the employees of the offices of the Executive Secretary will be 8:30 A.M. to 5:00 P.M., Monday to Saturday, inclusive, with a thirty minute period for lunch, 12:30 to 1:00 P.M., subject to regulations of Executive Secretary. These directions not to include the private secretaries to the Board Members.' "

Excerpt from Minutes of May 24, 1944

A resolution with respect to Absenteeism on the part of Referees was unanimously adopted as per attached, which is made a part of these minutes.

Resolution

Whereas, Absenteeism on the part of Referees, in the midst of their assignment, for more or less protracted intervals, as the Division has heretofore frequently experienced, is not conducive to efficient operation of the Division, and makes for duplication of effort, which the Division can ill afford; and

Whereas, The same complicates the accounting for services rendered; now therefore

Be It Resolved, Whenever a Referee shall find it necessary to absent himself with his assignment uncompleted, he is to be required to give due notice thereof to the Secretary, who will in turn advise the Chairman of the Division with an approximation of the number of days he shall expect to be absent; and

Be It Further Resolved, That as of the date the Referee may begin such absent period, the Secretary shall make record thereof and such Referee's compensation is hereby suspended, except as may be otherwise directed by the Division, until he shall next again report to the Division to resume his assignment.

Adopted by First Division, May 24, 1944.

Excerpts from Minutes of November 5, 1947

At 10:00 A.M. the following resolution was adopted:
Resolved that requests for extension of time to file reply to submissions after grant of 90 days of extension must be in writing.

First Division

National Railroad Adjustment Board

Excerpt from Minutes of May 2, 1949

At hearing of the Gulf, Mobile & Ohio Railroad, Order of Railway Conductors cases, the following resolution was offered and adopted:

Resolution

Parties having agreed to waive hearing when cases were called and to draft and file rebuttals to each others' submission within 90 days it is moved that these cases be entered upon our calendar as of this date.

In view of the foregoing resolution oral hearing is waived in these six dockets as of today.

First Division

National Railroad Adjustment Board

Excerpt from Minutes of May 24, 1949

Resolution

Whereas, Section 3, First (w) of the Railway Labor Act authorizes any Division of the National Railroad Adjustment Board in its discretion to establish regional boards to act in its place and stead for such reasonable period as may be necessary and,

Whereas, the First Division of the National Railroad Adjustment Board finds that it is necessary that such boards be established

Therefore, be it resolved by the First Division of the National Railroad Adjustment Board that two such boards be, and they are hereby, established, consistent with the spirit of the memorandum signed at Chicago May 19, 1949,

by the chiefs of the interested labor organizations and representatives of the railroads (attached, as an appendix, and made a part of this resolution) as follows:

Two supplemental boards of four men each are established under the provisions of Section 3 First (w) of the Railway Labor Act with authority to handle cases now on the docket of the First Division of the National Railroad Adjustment Board, assigned to them by such First Division, and such additional cases as may be assigned to them by such Division, as hereafter provided. One board shall consist of one representative each appointed by the Brotherhood of Loc. Engineers and Brotherhood of Loc. Firemen & Enginemen, and two representatives appointed by the Carriers. The other board shall consist of one representative each appointed by the Order of Railway Conductors and Brotherhood of Railroad Trainmen, and two representatives appointed by the Carriers.

The Carrier Members of such Boards shall be designated in keeping with rules devised for this purpose by the Carrier Members of the Adjustment Board and the Labor Members shall be designated in keeping with rules devised for this purpose by the Labor Members of the Adjustment Board.

Each of such Boards shall during the time for which it is appointed have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the Division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with such adjustment Boards in the same circumstances and the same manner as provided in Section (3), First (1) of the Railway Labor Act.

The members on such boards may be changed from time to time. Representatives from any railroad involved in cases assigned to such boards may be appointed as board members to handle cases coming from that railroad and members may be changed from time to time as the cases involve different railroads.

Initially the First Division will assign cases which have not been certified for appointment of a referee from among railroad systems having ten or more cases on the docket involving employees represented by either or both of the Organizations on each board respectively.

Thereafter, from time to time the First Division will assign to such supplemental boards cases from among railroad systems having ten or more cases docketed, in the same manner as described in the preceding paragraph.

Cases where the interest of an organization not represented on such supplemental board is asserted by either party or by a member of the First Division, shall be retained by the First Division and shall not be assigned to such supplemental board.

Each of such Boards shall be located in Chicago, Illinois, meet regularly and continue in session so long as there is pending before it any case submitted for its consideration and which has not been disposed of.

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

Excerpt from Minutes of June 14, 1949

Resolution

"Be it resolved that the following method be adopted for determining cases to be assigned to the Supplemental Boards established by the resolution of 5/24/49: At the time of making the assignment the average docket number for each railroad having 10 or more cases assignable to the Engineers' and Firemen's Supplemental Board shall be determined by adding together the numbers of all dockets of each railroad so assignable, then on the working list, and dividing the sum by the number of dockets and the assignments shall be by railroad in the order of the numerical value of the average docket numbers. Cases shall be assigned to the Conductors' and Trainmen's Supplemental Board by the same method.

"At such time as the Division determines by a majority vote that assignments shall be made to the Supplemental

Boards they shall be made in accordance with the above method."

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

Excerpt from Minutes of September 22, 1949

The following resolution was adopted:

"Move that the cases shown upon the attached lists of September 17, 1949 are assigned to the respective Supplemental Boards and shall be distributed to the parties interested.

"The parties shall be notified that cases received by the First Division after September 17, 1949 will not be added to these lists and that the withdrawal of cases included in any list, subsequent to September 17, 1949 will not deprive the Supplemental Board of jurisdiction of the remaining cases even tho the remaining cases be less than ten in number."

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

Excerpt from Minutes of October 5, 1949

Resolution

"That the Secretary be directed to send the following notice to the Florida East Coast and Chicago & Eastern Illinois Railway Company and to the respective Committees concerned:

"The Conductors' and Trainmen's Supplemental Board will convene on Monday, October 10, 1949, at 10:00 A.M. to proceed with the consideration and decision of assigned dockets.

"For good cause shown, the dockets involving the Florida East Coast Railway Company are set over until Wednesday, October 19, 1949, at 10:30 A.M. On October 10, 1949, the Supplemental Board will begin with consideration of the dockets involving the Chicago & Eastern Illinois Railway Company.

"The further order of business with the calendar of cases assigned to the Supplemental Board will be arranged and ordered by said Board, referring said matters to this Division only in event of disagreement.

By order of First Division."

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

Excerpt from Minutes of October 6, 1949

"The Engineers' and Firemen's Supplemental Board will convene on Monday, October 17, 1949, at 10:00 A.M. to proceed with the consideration and decision of assigned dockets. The Board will begin with consideration of the dockets involving the St. Louis-San Francisco Ry. Co. assigned to it in the calendar of cases issued September 17, 1949.

"The further order of business with the calendar of cases assigned to the Supplemental Board will be arranged and ordered by said Board, referring said matters to this Division only in event of disagreement.

"By order of First Division."

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

Excerpt from Minutes of October 14, 1949

Resolution

(Circular B attached.)

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South LaSalle Street, Chicago 3, Illinois
Telephone: Andover 3-1050

October 14, 1949

Circular B

(*Ex Parte* Submissions)

To the Representatives of the Carriers and the Employes Subject to the Jurisdiction of the First Division:

The following changes in the rules of procedure with respect to *ex parte* submissions are adopted effective November 1, 1949:

The party or parties making an *ex parte* submission shall, at the time of filing the submission with the Division, furnish a copy of such submission to the other party or parties to the dispute. The other party or parties to such dispute shall have thirty (30) days from the date of notification by the first Division that the submission has been received in which to answer such submission and shall, at the time of filing such answer, furnish copy of the answer to the submitting party or parties.

The submitting party or parties shall then have thirty (30) days from the date of notification by the Division that such answer has been received in which to file a reply to such answer if desired and, at the time of filing such reply, shall furnish copy thereof to the opposing party or parties.

Such reply shall be limited to response to the answer and shall contain no new facts or matter not in direct response to the points contained in such answer.

Nothing herein shall change existing rules or practices with respect to extensions of time and they shall be applicable to submissions, answers or replies.

Notice to the Secretary, First Division, of intention to file *ex parte* submissions, is not required from and after November 1, 1949.

Former rules shall apply with respect to any notice of intention to file an *ex parte* submission, received by the Secretary of the division before November 1, 1949.

By Direction of the First Division,
National Railroad Adjustment Board.
T. S. McFarland,
Executive Secretary.

First Division

National Railroad Adjustment Board

Excerpt from Minutes of February 14, 1950

Upon motion by Mr. Coyle and seconded by Mr. Keiser a resolution was adopted to the affect that the following would be inserted in the awards of the First Division rendered by a Supplemental Board in appropriate language to indicate Supplemental Board by which the award was rendered:

The First Division consisted of Conductors' and Trainmen's Supplemental Board Members (and in addition Referee .....) when award was rendered.

First Division

National Railroad Adjustment Board

Excerpt from Minutes of May 22, 1950

The following motion was adopted:

Move that the cases shown on the lists of May 17, 1950 are assigned to the Conductors'-Trainmen's Supplemental Board and shall be distributed to the parties interested.

The parties shall be notified that cases received by the First Division after May 17, 1950 will not be added to these lists and that the withdrawal of cases included in any list, subsequent to May 17, 1950 will not deprive the Supplemental Board of jurisdiction of the remaining cases even tho the remaining cases be less than ten in number.

First Division

National Railroad Adjustment Board

Excerpt from Minutes of February 14, 1951

Resolution

It was moved by Mr. Keiser that Dockets Nos. 25146 and 25445, heretofore assigned to a Supplemental Board, be withdrawn from such Supplemental Board and placed on the working calendar of this Division handling to a conclusion. The motion was seconded by Mr. Dugan and was adopted by the unanimous vote of the Division.

E D.

Cases Disposed of
First Division, National Railroad Adjustment Board

July 1, 1947—December 31, 1950

Fiscal Year	Number of Awards Made	Awards Made Without Referee				Awards Made With Referee				Cases Withdrawn
		Total	Sustained	Denied	Cond'l Compr. Rem'd Dism'd	Total	Sustained	Denied	Cond'l Compr. Rem'd Dism'd	
1948 — From July 1, 1947 to June 30, 1948	624	96	22	59	15	528	195	262	71	202
1949 — From July 1, 1948 to June 30, 1949	554	165	39	100	26	389	101	202	86	177
Cases Disposed of by First Division and Supplemental Boards										
1950 — From July 1, 1949 to June 30, 1950	890	221	26	148	47	669	205	366	98	548
First Half Fiscal Year 1951—From July 1, 1950 to Dec. 31, 1950	447	119	17	79	23	328	104	175	49	155
Total	2515	601	104	386	111	1914	605	1005	304	1082

Cond'l—Conditional; Compr.—Compromise; Rem'd—Remanded; Dism'd—Dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Consumers Building
220 South State St., Chicago, Illinois
Nineteenth Floor

T. S. McFarland, Secretary

Wm. Bishop, Chairman	R. A. Knoff, Vice Chairman
D. H. Bremerman	Fred W. Lewis
Paul M. Carter	L. L. McDonald
R. E. Edrington	G. H. Oram
E. W. Fowler	M. F. Rolfe

[Stamp:] Received 9 A.M., Mar. 10, 1936, Richmond

March 7, 1936.

Mr. A. Johnston,
Grand Chief Engineer, B. of L. E.,
1112 B. of L. E. Building,
Cleveland, Ohio.
Mr. J. A. Phillips,
President, O. R. C.,
O. R. C. Building,
Cedar Rapids, Iowa.
Mr. D. B. Robertson,
President, B. of L. F. & E.,
318 Keith Building,
Cleveland, Ohio.
Mr. A. F. Whitney,
President, B. of R. T.,
B. of R. T. Building,
Cleveland, Ohio.
Mr. T. C. Cashen,
President, S. U. of N. A.,
3 Linwood Avenue,
Buffalo, New York.

Dear Sirs and Brothers:

The propriety of submitting jurisdictional disputes to the National Railroad Adjustment Board, First Division, has

been a matter of discussion and correspondence by each of the Labor Representatives of the Board with their respective Chief Executive.

Jurisdictional disputes are controversial matters between the Organizations and, in our opinion, should not be submitted to this Board.

The Labor Members as now constituted are a unit in protecting the Contracts of the five Organizations, and we feel that it would be unwise to submit matters of a controversial nature between the Organizations to the Board, which would in any way divide the Labor Group; therefore, we would recommend that all disputes of jurisdictional character now pending before the Board be withdrawn and other methods be adopted for their adjudication.

Yours fraternally,

R. E. EDRINGTON,
Asst. Grand Chief Engineer, B. L. E.
G. H. ORAM,
Vice President, O. R. C.
FRED W. LEWIS,
Vice President, B. of L. F. & E.
WM. BISHOP,
Vice President, B. of R. T.
PAUL M. CARTER,
Acting Vice President, S. U. of N. A.

March 8, 1951

Mr. Benjamin F. Graeff, General Chairman
Bro. of Loc. Firemen & Enginemen (Reading RR)
Room 34, 24 N. Sixth Street
Reading, Pennsylvania
Dear Sir and Brother:

You have a case docketed with this Division which is a claim for one day's pay at Engineers' rate on December 9, 1946 for emergency engineer Lawrence N. Harty, Docket No. 23895.

I have had an opportunity to study this case, which was today considered in executive session, and at my request no action was taken by the Division. I find that this claim

involves an interpretation of Rule 14 (c) of the Firemen's Schedule, and Rule 14 (d) of the Engineers' Schedule. However, the claim is made for rates of pay provided for in the Engineers' Agreement, and in line with the practice of this Division, the Engineers' General Chairman was requested to advise whether or not the rules of the Engineers' Agreement relied upon by the petitioner support the claim, and for your information, I am attaching copy of reply made by General Chairman Wm. R. Hamm under date of March 12, 1949.

As this dispute is more or less a controversy between the B. of L. E. and the B. of L. F. & E., you should realize that it will be impossible for me to secure a sustaining award from this Division, as the B. of L. E. representative on this Division will vote with the Carrier Members in denying the claim. Rather than get a denial award from this Division, I think it would be much better if you would withdraw this case from further consideration by this Division, provided the Carrier will join you in such withdrawal. The case, having been submitted jointly, if withdrawn, must be withdrawn jointly by the Railroad and the Organization. If you do not care to do this, I will let it come to vote of members of the First Division, and the award will, of course, deny the claim for the reasons stated above.

Would appreciate advice from you at an early date.

Fraternally yours,

W. C. Kei[illegible]

WCK/JS

Att.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Stamp:] Received Jan. 23, 1953. Office of the Clerk, Supreme Court, U. S.

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the attached envelope is the original sealed deposition of Walter C. Keiser, forwarded to this Court with the transcript of the record from the Clerk of the United States District Court for the Northern District of Georgia, at Atlanta, Georgia, on appeal in cause No. 13969, of the docket of said Court of Appeals, entitled: Brotherhood of Locomotive Firemen & Enginemen, Appellant, versus Central of Georgia Railway Company, et al., Appellees, and are transmitted herewith to the Honorable Supreme Court of the United States in connection with the petition for writ of certiorari.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals for the Fifth Circuit, at the City of New Orleans, this 21st day of January, A. D., 1953.

OAKLEY F. DODD
Clerk, U. S. Court of Appeals for the Fifth Circuit

(SEAL)

CLERK'S CERTIFICATE AS TO SEALED DEPOSITION OF WALTER C. KEISER.

UNITED STATES OF AMERICA,
Northern District of Georgia, ss.

I, F. L. Beers, Clerk of the United States District Court in and for the Northern District of Georgia, do hereby certify that the attached is the sealed Deposition of Walter C. Keiser as filed in Office of the Clerk on May 2, 1951, and remains sealed as of this date, in the matter of Brotherhood of Locomotive Firemen and Enginemen, et al., Appellants, v. Central of Georgia Railway Company, Grand International Brotherhood of Locomotive Engineers, et al., Ap-

pellees, as specified in the Designation of Contents of Record herein.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this 31st day of January, A.D. 1952.

F. L. BEERS,
Clerk, United States District Court,
Northern District of Georgia,
By—
J. L. MOORE,
(J. L. Moore) Deputy Clerk (SEAL)

(6044)

27

Office - Supreme Court, U.S.
FILED
FEB 24 1953
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 554

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Petitioner,*

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY,
GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS ON THE CENTRAL OF GEORGIA RAILWAY,
T. A. HOLLINGSWORTH, GENERAL CHAIRMAN,
H. L. BISHOP, JR., VICE CHAIRMAN,
H. E. HIMES, C. L. COWAN, H. L. STEPHENS, J. W. FARR and C. M. GOBER,
Respondents.

BRIEF OF CENTRAL OF GEORGIA RAILWAY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Citizens & Southern Natl. Bank Bldg.
Atlanta, Georgia
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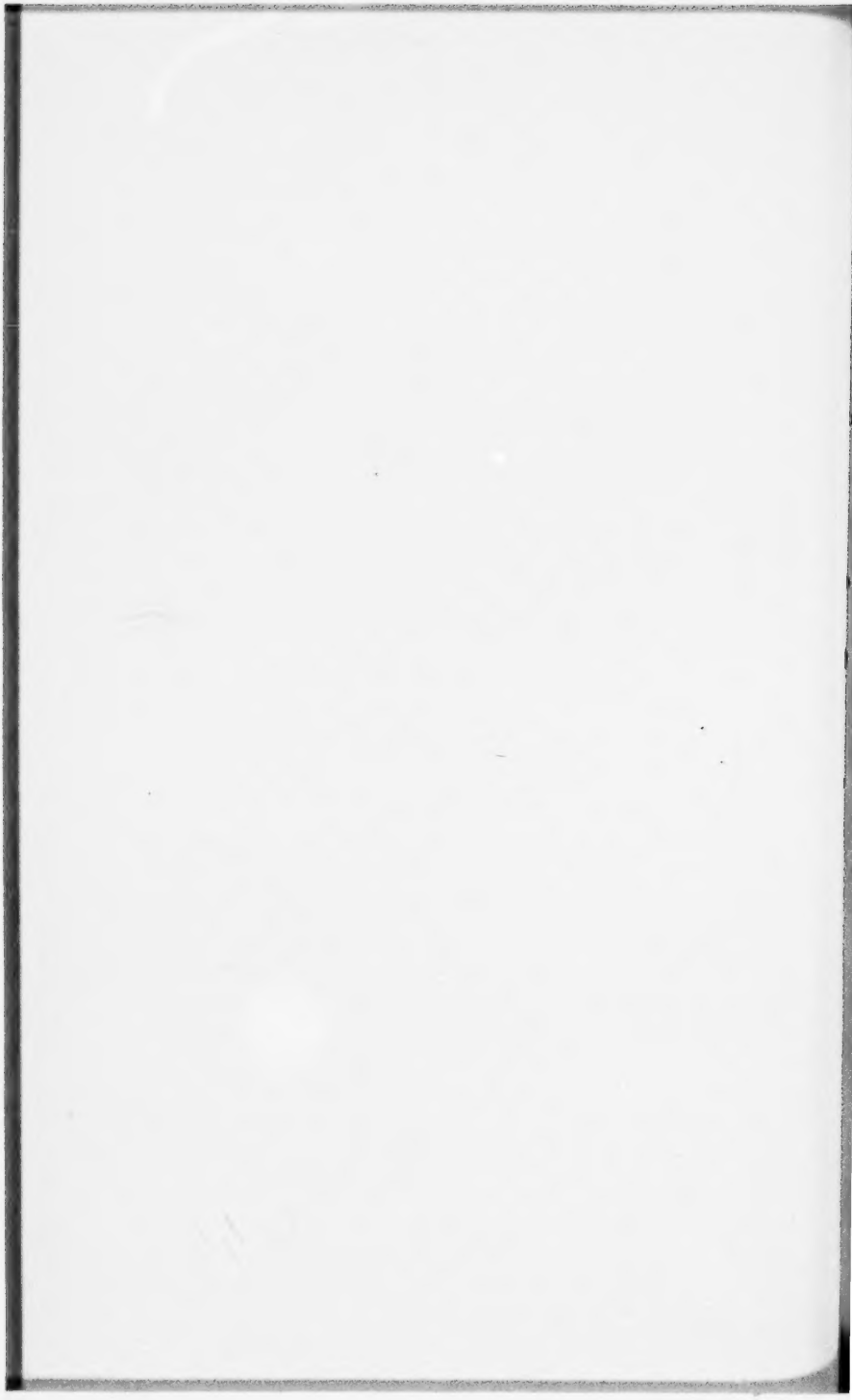

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, ET AL.

Respondents.

No. 554

BRIEF OF CENTRAL OF GEORGIA RAILWAY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

It is difficult for us to determine just what questions are presented for the decision of this Court by the petition for certiorari in this case, and just what questions would be for decision by this Court if the writ is granted. (See "Questions Presented," Petition page 2; "Reasons for Granting the Writ," Petition page 6; and "Specification of Errors to be Urged," Brief page 7). However, it is clear that the Petitioner does not deny the proposition of law, so well settled by the cases cited by the Court of Appeals (R. page

77), that the Adjustment Board has exclusive jurisdiction over disputes involving the interpretation of labor contracts, which this case most certainly involves. The Petitioner approaches this Court solely on the proposition that *the record shows* that if it went to the Adjustment Board it could not get from that Board the due process of law which is guaranteed by the Fifth Amendment to the Federal Constitution, and that, for that reason, the District Court should have assumed the jurisdiction which this Court has so often said it does not have, and settled this dispute over the interpretation and application of certain contracts.

In point of fact, *there is nothing in the record* in this case which shows that Petitioner would not have had due process of law if it had submitted this controversy to the Adjustment Board. This assertion of ours is basic. To sustain it we point out the following:

The District Court dismissed this case for want of jurisdiction at a pre-trial hearing. At that hearing Petitioner stated that Petitioner had taken the depositions of an official of the Adjustment Board which it said sustained its contention that it could not get due process before the Adjustment Board. These depositions were still in the office of the Clerk of the District Court, sealed and unopened. They were never formally tendered in evidence. Petitioner's Counsel asked permission to refer to their copy of the depositions, which was refused, but the Court permitted them to summarize them (R. pages 62, 63). At the very end of the hearing and after the Court had announced his conclusion that he did not have jurisdiction, Petitioner said:

"One other question, if I may raise it at this time. We want to be perfectly sure that we have the depositions available to us on appeal. Would it be possible for Your Honor to go ahead and open the depositions if that should be necessary?"

The Court refused to do so, saying "I am not hearing any evidence on the matter. I am deciding it on the question of jurisdiction." (R. pages 68, 69). This was eminently correct. A pre-trial hearing is no place to consider testimony which has not been admitted in evidence (*Clay vs. Callaway, Trustee,* 177 F (2d) 741, 743).

Petitioner appealed to the Court of Appeals. In its "Designation of contents of record," Petitioner included "The deposition of Walter C. Kiser and attached exhibits" (R. page 72), whereupon the District Judge ordered the Clerk to transmit those depositions with the attached exhibits to the Court of Appeals "so that the Court of Appeals for the Fifth Circuit may, if it deems proper, examine such depositions in connection with the points raised by the appeal." (R. page 73).

In its brief in support of the petition for the writ of certiorari, Petitioner would give this Court to understand that the Court of Appeals considered the contents of the depositions and nevertheless concluded that the District Court did not have jurisdiction. *The Court of Appeals did no such thing.* The depositions had been sent to them in a sealed envelope and they never opened them, as is shown by Judge Borah's order directing the Clerk of the Court of Appeals to forward to this Court "the original sealed depositions" * * * "in its original form." (Appendix to petition for cer-

tiorari, page 4) and by the Clerk's letter (Appendix, page 10) referring to the fact that his certificate would "be attached to the deposition in its unopened envelope." The opinion of the Court of Appeals can be searched in vain for any reference to these depositions or their contents or for any ruling on the due process question; a ruling which they could not have made without first opening and examining the depositions, which they clearly did not do, since the depositions are still sealed. Only the following oblique reference to the due process point is contained in their opinion (R. page 77):

> "Only after the Adjustment Board has acted can it definitely appear that relief by the Court is necessary to insure compliance with the statute. Order of Conductors vs. Pitney, 326 U.S. 561; 66 S. Ct. 322, 90 L. Ed. 318."

We repeat, that while the Petitioner's "Specifications of Errors to be Urged" (Petitioner's brief page 7) all read as if it were a fact shown by the record that "the interests of the members of the First Division of the Board prevent them from rendering an impartial and disinterested award on the merits of Petitioner's grievances," and that "Petitioner could not secure an adequate administrative remedy from the Adjustment Board," and that "Petitioner could not secure due process of law from the Adjustment Board," the fact is that there is no such showing in the record. If the showing exists anywhere, it is to be found in these depositions, which were never opened by the District Judge or by the Court of Appeals and now lie in the office of the Clerk of this Court, still unopened. They are no part of this record and

were not the basis of any ruling by the District Court or by the Court of Appeals.

We protest the manifest impropriety of Petitioner's Counsel referring to and quoting from those depositions in his brief when they are not part of the record.

The District Court announced that he would stay the cause to give the Petitioner an opportunity to submit its case to the Adjustment Board (R. page 68). which would have been in line with the procedure approved by this Court in *Order of Conductors vs. Pitney,* 326 U.S. 561, and would have given Petitioner an opportunity to come back to the District Court after the hearing before the Adjustment Board and show that it had not gotten due process, if that were the fact. If they could have shown lack of due process, relief by the Courts might have been shown "necessary to insure compliance with the statute," as the Court of Appeals said in the last paragraph of its opinion. However, Petitioner deliberately deprived itself of this opportunity to have its due process point adjudicated by the Courts by telling the Court that they preferred an order of dismissal to a stay, and that is what they got (R. page 68).

CONCLUSION

On the record before this Court the only points on which this Court could pass are whether the Court of Appeals erred in holding (R. page 77) first, that the Adjustment Board has exclusive jurisdiction in this case and second, that it was premature to raise the question of denial of due process of law until due process of law has actually been denied.

We will not take more of this Court's time in arguing these questions, because the first is well settled

by the opinions of this and other Courts cited by the Court of Appeals on page 77 of the Record and the second is obviously correct.

Generally speaking, one who claims that he has not received or cannot receive due process of law must either attack the constitutionality of the enactment involved or of the procedure under it, or he must show that he has had a trial at which, by reason of bias, prejudice or something of the sort, he was not actually accorded due process. Certainly this Court will not hold unconstitutional the provisions of the Railway Labor Act, which provide for hearings before the Adjustment Board, or the administrative procedure under that Act, on what really amounts to no more than a statement by Counsel for the Petitioner indicting the members of the Board for bias or prejudice, when there is no record before this Court to sustain that indictment.

Respectfully submitted,

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Savannah, Georgia

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Atlanta, Georgia
Attorneys for Respondents.

Powell, Goldstein, Frazer & Murphy,
Atlanta, Georgia
Of Counsel

I certify that I have mailed copies of this brief to Counsel for all parties of record this February ....22....., 1953.

.....

A. R. LAWTON

28

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 554.

Office-Supreme Court, U.S.
FILED
FEB 24 1953
HAROLD B. WILLEY, Clerk

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,

Petitioner,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*

BRIEF OF RESPONDENTS, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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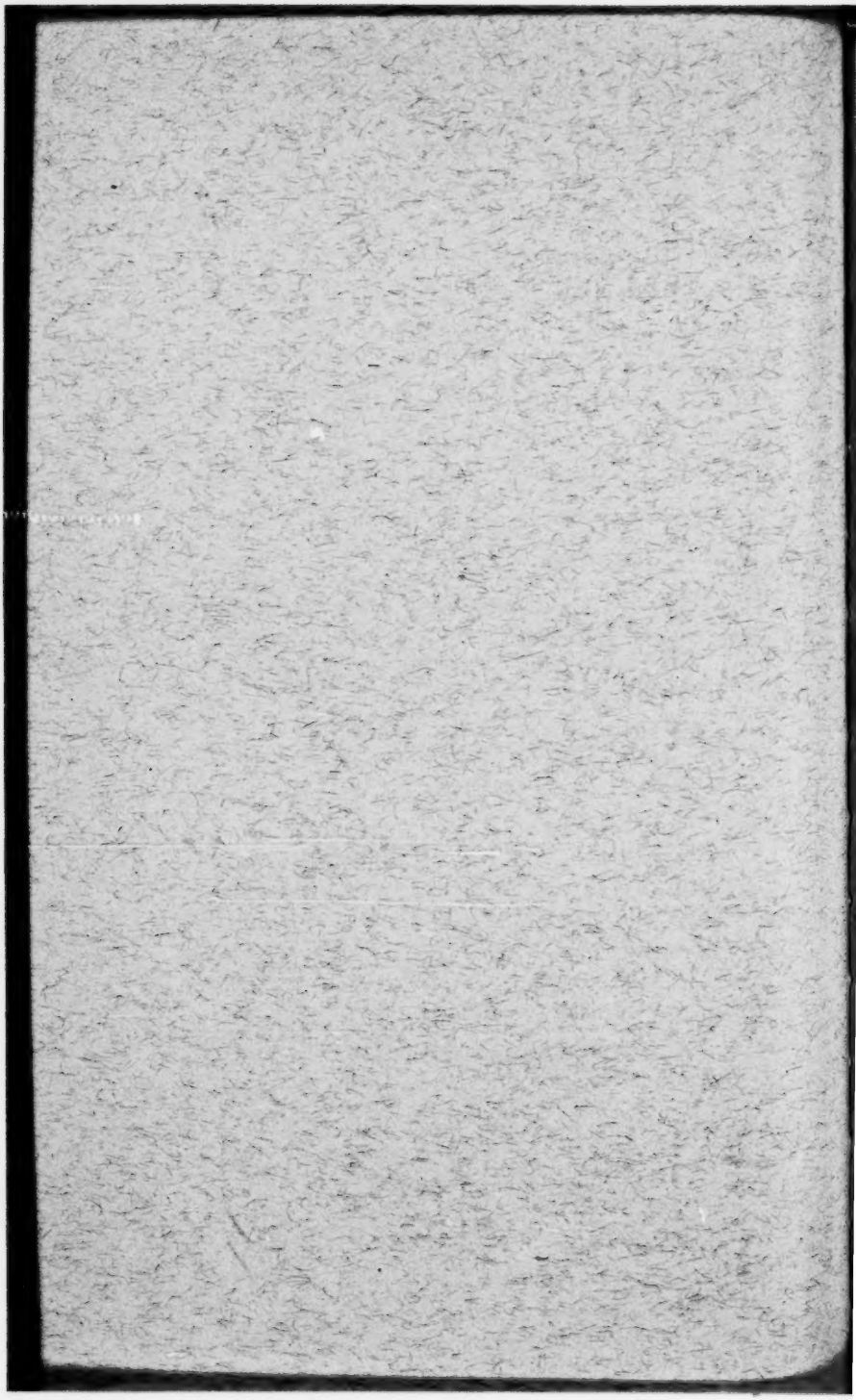

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 554.

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,

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vs.

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BRIEF OF RESPONDENTS, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit is reported in 199 F. 2d 384. There was no opinion of the District Court for the Northern District of Georgia.

JURISDICTION.

The petitioner seeks to invoke the jurisdiction of this Court under Section 1254(1) of Title 28, United States Code.

QUESTIONS PRESENTED.

1. Whether in a case not previously submitted to the First Division of the National Railroad Adjustment Board and admittedly involving the interpretation of a collective labor agreement, a complaint was properly dismissed as against an asserted unproven and speculative prediction as

to how a majority of the ten members of the Division would vote upon the claim if it were presented to the Division.

2. Whether there was prejudicial error in not receiving in evidence at pre-trial a deposition from which the aforesaid speculative prediction is asserted, when counsel for petitioner did not make an offer of the deposition, but was requested by the court to state, and did state, the substance thereof, argued as desired therefrom, and when the substance of the deposition was set forth in the brief in the Court of Appeals, argument was had thereon, and the Court of Appeals gave consideration thereto.

3. Whether the constitutional question as to violation of the Fifth Amendment was timely raised when brought up for the first time in the petition for writ of certiorari.

STATUTE INVOLVED.

The statute involved is the Railway Labor Act, 45 U. S. C. §§ 151 et seq. Sections 2, 3 and 6 of the Act (45 U. S. C. §§ 152, 153, 156) are set forth in the Appendix to the petition. Petitioner asserts that the case involves the due process clause of the Fifth Amendment to the Constitution. These respondents contend that the procedure prescribed by the Railway Labor Act is adequate and controlling, and that the constitutional question, which, in any event, was not timely raised, is not involved.

STATEMENT.

1. Procedure.

This brief in opposition to the petition for writ of certiorari filed by petitioner Brotherhood of Locomotive Firemen and Enginemen (hereinafter sometimes called "Firemen's Brotherhood") is filed on behalf of all respondents other than Central of Georiga Railway Company (herein-

after sometimes referred to as "Central of Georgia") with the exception of the named respondent T. A. Hollingsworth, who was deceased prior to the time of the pre-trial hearing in the District Court.

This action was filed in the District Court for the Northern District of Georgia on behalf of two individual plaintiff engineers, to wit, R. F. Hooker and George Ketterbaugh, with whom was joined the petitioner herein. The controversy alleged in the complaint arose out of a dispute between the respondent Central of Georgia Railroad Company and these engineers. Hooker claimed that the Central of Georgia had denied him the exercise of his seniority as an engineer in the manner in which he claimed he had the right to exercise it. Hooker, the senior engineer, had displaced the plaintiff Ketterbaugh, and it was claimed that Ketterbaugh would not have been displaced if Hooker had been permitted to exercise his seniority in accordance with Hooker's claim. Hooker sought damages in the amount of $1000.00 for alleged violation of his seniority rights (R. 11, 15), and Ketterbaugh sought damages in the amount of $2000.00 for alleged violation of his seniority rights (R. 11, 12, 15), and injunctive and general relief was asked. The complaint was dismissed by the District Court as to all plaintiffs, but no appeal was filed on behalf of either Hooker or Ketterbaugh in the Court of Appeals for the Fifth Circuit.

The primary and fundamental question presented by the complaint and the amended complaint is one involving only the interpretation or construction of a collective bargaining agreement. This is substantially conceded by the petitioner in its brief herein (p. 9). Jurisdiction of the District Court was challenged both by the answer of the carrier, respondent Central of Georgia, and by answer of the respondents Brotherhood of Locomotive Engineers, the

collective bargaining agent for the engineers craft (hereinafter sometimes referred to as "Engineers' Brotherhood") et al.

At the outset of the pre-trial hearing the Court called upon counsel for the plaintiffs to discuss the jurisdiction question (R. 49, 50). After extensive discussion of law questions counsel made reference to a filed but unopened deposition in support of the claim that although the case involved the interpretation of collective bargaining agreements, nevertheless the Court, instead of the First Division of the National Railroad Adjustment Board, should take jurisdiction of the case. The substance of the deposition was stated (R. 62-64), apparently as desired by counsel, but no request of the Court to receive the deposition in evidence was made and the deposition was not formally offered in evidence. Near the conclusion of the hearing and after the Court stated it would be his decision to stay the cause to give opportunity to submit the matter to the Adjustment Board (R. 68), counsel stated that plaintiffs would prefer to have a dismissal "on the ground that this Court does not have jurisdiction" so that an immediate appeal could be taken (R. 68). It was not until after the Court had stated that "an order dismissing it for want of jurisdiction" would be granted that counsel for plaintiffs asked if it would "be permissible" for the Court "to go ahead and open the deposition *if that should be necessary,*" (R. 68), at which time the Court stated:

> "No, sir, I am not hearing any evidence on the matter. I am deciding it on the question of jurisdiction. I do not have jurisdiction of the cause, and I am perfectly willing to stay the proceedings to give you an opportunity to submit it to the Railway Adjustment Board, but if you prefer dismissal and do not wish that opportunity, then your wishes will be respected, and

order dismissing the cause for want of jurisdiction will be entered." (R. 69.)

The order of the Court dismissing the action is as follows:

"The above and foregoing case is hereby dismissed upon the ground that the Court is without jurisdiction." (R. 48).

Upon the appeal to the Court of Appeals for the Fifth Circuit the contents of the deposition were discussed at even greater length in the briefs filed by the appellant, petitioner herein. Extracts from, and paraphrasing of, statements in the deposition to the extent of not less than 18 printed pages were set forth in the briefs in the Court of Appeals and argument thereon was pursued by petitioner's counsel—all to the same effect and purport as if the deposition had been received in evidence and made part of the record. The opinion of the Court of Appeals (R. 77) indicates that the Court gave consideration to the contentions of the petitioner herein arising out of the deposition in its reference to the claim of petitioner to the effect that "the aggrieved party cannot secure an adequate remedy before the Adjustment Board, and that the facts here so disclose." (R. 77). Petitioner apparently concedes this in its motion to have the deposition transmitted to this Court (Appendix to Petition for Writ of Certiorari, p. 2) when it states that the opinion of "the District Court indicates that its decision is based upon a consideration of that contention."

2. Facts.

The dispute concerning the displacement of Hooker and Ketterbaugh mentioned above centers around, and its resolution is dependent solely upon, the interpretation or construction of an agreement of April 19, 1946 between

respondent, the Central of Georgia, and the petitioner and respondent Brotherhoods. This agreement set forth the conditions under which engineers would be permitted to return to employment as firemen at a particular terminal without being required to exhaust the exercise of their seniority as engineers at some outlying point on the seniority district, and provided that engineers, instead of being first required to exhaust all seniority as engineers on the entire seniority district, would be permitted to "exercise all their seniority" as engineer and fireman at a particular terminal before being required to go to another point on the same district (R. 18), and also provided that an engineer "must exhaust all his seniority as an engineer" at the particular terminal before being permitted to return to work as a fireman at that point (R. 18). These rules of the April 19, 1946 agreement are still in effect and, contrary to petitioner's contention, have not been modified. Petitioner's contention (R. 9, 10, 12; Petition 3, 4) is that an agreement of July 20, 1948 between the Central of Georgia and the Engineers' Brotherhood, the craft representative of the locomotive engineers, has been given effect by the Central of Georgia, and has resulted in changes in working conditions claimed to have been established by the agreement of April 19, 1946. The agreement of July 20, 1948, contained a provision that no road engineer would be permitted to displace at a given terminal a yard engineer who does not hold rights in road service as engineer or fireman so long as the road engineer stands for assignment in road service at any point on his seniority district (R. 10). But this provision was not new. As hereinafter detailed, it was a re-statement and carryover of a rule that had been in effect since 1905 and which had been expressly agreed to in writing by petitioner's representative as far back as 1933 (R. 27-28).

Hooker, who had both road and yard rights as engineer, sought to displace a yard engineer without road rights working at the same terminal, but was not permitted to do so (R. 11). Hooker then went to another terminal on the seniority district and displaced Ketterbaugh, a junior road engineer. Petitioner's claim is that under the agreement of April 19, 1946, Hooker could have displaced the yard engineer and that Ketterbaugh would not have been affected thereby because the yard engineer could not have displaced him from his road position. The respondents' position is that all the seniority possessed by Hooker did not include seniority to displace at the same terminal a yard engineer having no road seniority so long as Hooker stood for a road job at any place on the district, and that the seniority of road engineers had been so limited at the time the April 19, 1946 agreement was entered into, and had been so limited for many years prior thereto. Thus at the very instant the agreement of April 19, 1946 was signed, and until the agreement of July 20, 1948 was signed, as well as thereafter to the present, Hooker's seniority was limited by the restriction against displacing a yard engineer having no road rights.

The respondents, Engineers' Brotherhood et al., take sharp issue with the claim of petitioner (Petition 2, 3) that the agreement of July 20, 1948, changed rules or working conditions as contained in the aforesaid agreement of April 19, 1946. The agreement of July 20, 1948 does not purport to, and does not, in any way modify the tri-party agreement of April 19, 1946, but expressly changes special agreements of April 4, 1946 and December 5, 1947 between the Central of Georgia and the Engineers' Brotherhood (R. 9, 10, 27-29). The agreement of April 19, 1946, in referring to the exercise of seniority of engineers, uses the phrases "all their seniority" and "all his seniority" (R. 18). It is

obvious that these phrases require interpretation for the purpose of determining what the seniority of the engineers was at the time the agreement of April 19, 1946 was entered into. It is the contention of the respondent Central of Georgia (R. 27-29) that the agreement of July 20, 1948 did not in any way conflict with the agreement of April 19, 1946, and that the 1948 agreement, with respect to the part complained of, was but a re-statement of an earlier rule to be found in the aforementioned agreement dated April 4, 1946, which was in turn a re-statement of an agreement entered into in the year 1933 between the Central of Georgia and both petitioner and respondent Brotherhoods, and further, that the 1933 agreement was a statement of a rule covering the same custom and practice which had been in existence since the year 1905.

It was similarly the contention of respondents Engineers' Brotherhood et al., (R. 39) that the provisions of the 1948 agreement did not in any way modify or change the provisions of the agreement of April 19, 1946, and that the 1948 agreement carried forward and preserved rules and agreements concerning the exercise of seniority by road engineers in respect to yard engineers as the same had existed on April 19, 1946, and both prior and subsequent thereto.

SUMMARY OF ARGUMENT.

The question in this controversy involves the construction or interpretation of a collective bargaining agreement. Under the controlling decisions of this Court, *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239, *O. R. C. v. Southern Ry. Co.*, 339 U. S. 255, *O. R. C. v. Pitney*, 326 U. S. 561, the First Division of the National Railroad Adjustment Board has exclusive jurisdiction to determine the controversy. In the absence of such exclusive jurisdiction

in the Board, the District Court would have no jurisdiction, since the validity, construction or effect of a federal statute is not involved. *Shulthis v. McDougal*, 225 U. S. 561, 569; *Gully v. First National Bank*, 299 U. S. 109, 112; *Oldland v. Gray*, 179 F. 2d 408, 412; *Starke v. N. Y. C. & S. L. R. Co.*, 180 F. 2d 569, 571. The Court of Appeals, in affirming judgment for dismissal of the complaint, correctly followed and applied these decisions. In any event, the case does not present an important question of federal law calling for further review by this Court as the factual situation is of limited scope, is unlikely to recur, and the individual plaintiffs whose contract rights were claimed to have been breached did not appeal from the dismissal of their complaint.

The dispute as presented in the petition is a jurisdictional dispute, as to which type of dispute Congress left "a minimum of responsibility to the courts." *O. R. C. v. Pitney, supra*, at p. 566, and which type of dispute is not to be resolved by the courts, but by mediation and conciliation processes. *G. C. of A. of B. of L. E. v. M-K-T R. Co.*, 320 U. S. 323; *O. R. T. v. Railway Express Agency*, 321 U. S. 342; *O. R. C. v. Pitney, supra.*

There is no prejudicial error shown in petitioner's claim that the courts below did not hear petitioner's evidence from the unadmitted and unoffered deposition, since petitioner fully presented the factual substance thereof in both courts and argued fully therefrom, as it has done in support of the petition herein.

A consideration of the deposition shows petitioner's asserted contention that there would be a lack of due process in proceeding in this dispute is not substantiated. How members of the Division would vote is not pre-determinable and the deposition so shows. Carrier members frequently vote against the contentions of carriers in-

volved; labor members frequently vote to deny claims; deadlocks are not shown to result merely from "bi-partisan considerations" without regard to merit of claims. The statutory bi-partisan character of the Board is well recognized. With respect to disputing parties, namely, two opposing labor organizations having members on the same Division of the Board, the controversies in the instant case and the *Pitney* and *Slocum* cases are identical in character. Petitioner's proof fails completely to show the "totality of facts" (*Betts v. Brady*, 316 U. S. 455) which would justify its contention that the case would not be heard on its merits, and shows no substantial reason for departure in the instant case from the doctrine of the *Pitney* and *Slocum* cases.

In the courts below, petitioner sought only to obtain an exception to, or modification of the effect of, the decisions of this Court in the *Slocum* and *Pitney* cases, and no claim of violation of the Fifth Amendment was made or passed upon in those courts. The constitutional question, being raised for the first time in the petition herein, is not timely raised, and should not now be considered. *Duignan v. United States*, 274 U. S. 195, 200; *Blair v. Oesterlein Machine Company*, 275 U. S. 220, 225; *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430, 434.

ARGUMENT.

1. There are no substantial reasons for granting the writ of certiorari because the decision of the Court of Appeals correctly followed and applied decisions of this Court and the case involves no erroneously decided questions of law nor questions of great public importance requiring decision by this Court.

The judgment of the Court of Appeals in affirming the judgment of the District Court and in upholding the exclusive jurisdiction of the First Division of the National Railroad Adjustment Board in the instant controversy correctly and properly followed the decisions of this Court in the cases of *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239, *Order of Railway Conductors v. Southern Railway Company*, 339 U. S. 255, and *Order of Railway Conductors v. Pitney*, 326 U. S. 561. Moreover, if exclusive jurisdiction in this controversy should not be lodged in the Adjustment Board there would still be no jurisdiction in the District Court because of the absence of a federal question. The seniority involved herein arises solely out of collective bargaining agreements entered into on behalf of the craft of engineers by the respondent Brotherhood as the craft representative designated in accordance with the provisions of the Railway Labor Act. A dispute arising under or out of such agreements is one of contract interpretation and does not arise from a right created by federal law. Since there is no question of "validity, construction or effect" of a federal law there is no federal question involved. *Shulthis v. McDougal*, 225 U. S. 561, 569; *Gully v. First National Bank*, 299 U. S. 109, 112; *Oldland v. Gray*, 179 F. 2d 408, 412; *Starke v. N. Y. C. & St. L. R. Co.*, 180 F. 2d 569, 571.

In opposing petitioner's stated reason for granting of the writ herein these respondents respectfully submit that

the case does not present for determination an important question of law requiring decision by this Court, and that the questions claimed by petitioner to be involved herein do not affect, nor are they likely to affect, any substantial number of persons, either employers or employees, in the railroad industry.

When all of the facts of the controversy are fully considered it must appear that this case is not one of general and widespread import but is one whose decision would have little interest, effect or importance beyond the parties originally involved therein. The procedure established under the Railway Labor Act, which petitioner attacks in this case as inadequate and lacking in due process, has been in effect since 1934, during which time the First Division of the National Railroad Adjustment Board has docketed more than 30,000 cases and has rendered awards in more than 16,000 of these cases.[1] Insofar as the record herein indicates, or any claim is made by petitioner, this is the first case in which the procedure of that Board has been attacked as inadequate or lacking in due process on the alleged ground of a possible conflict in views between two of the members of the Division representing labor organizations. Even in this case only two individuals whose employment or earnings were claimed to have been affected were parties to the action, one claiming damages in the amount of $1000.00 and the other in the amount of $2000.00. But apparently neither of these individual plaintiffs, although represented by the same counsel who represent petitioner, has any of petitioner's ostensible fears of having the claims presented to the First Division of the National Railroad Adjustment Board, nor has either considered his claim or the questions,

[1] Case number 30,662 was docketed February 9, 1953, and award number 16,062 was issued February 2, 1953.

said by petitioner to be involved, of sufficient importance to continue with the case subsequent to the dismissal by the District Court. This case, therefore, is filed before this Court with an apparent purpose of seeking a ruling upon an abstract question of law where the original participants whose alleged contract rights were claimed to have been adversely affected have withdrawn. It is difficult, if not impossible, to find any substantial property interest of petitioner which would now be involved in this action or in a proceeding before the Adjustment Board. Certainly no claim for money due the petitioner is involved arising out of the alleged violation of the April 19, 1946 agreement, for the only persons whose money interests could be said to be involved were the two individual plaintiffs who are not seeking any relief from this Court. Since those claimants have abandoned further prosecution of the suit, whatever interest, if any, petitioner had in the suit now appears to be without substance.

Moreover, the case has been definitely postured by petitioner into one of jurisdictional dispute. This appears from petitioner's frequent references to the so-called alignment of the parties and appears to be conceded by petitioner in its reference (Br. 12) to the letter of March 7, 1936 (Ex. E to Keiser deposition; Appendix to Brief a20; and Appendix to Petition 86). This letter dealt with the subject of jurisdictional disputes which were therein described as "controversial matters between the organizations." If it be assumed that that letter, written by the labor members of the First Division, has heretofore resulted in keeping jurisdictional disputes from consideration by the Board, then it would be reasonable to assume that the resolution of such disputes, if any have existed, has been accomplished through other than administrative or judicial channels. If no such disputes have arisen then the

alleged importance of any further review of this case falls of its own weight. While petitioner asserts (Br. 20) that a case similar to the instant case could have been filed in court prior to the *Pitney* and *Slocum* decisions, and has cited a number of cases in that connection (Br. 20, Note 17), it is to be noted that these cases are quite dissimilar factually and that none was a case involving a jurisdictional dispute. Nowhere has petitioner claimed that the lack of the filing of such jurisdictional cases with the Adjustment Board has required or resulted in a determination of such disputes by a court. Indeed, it could not well do so, for this Court has decided in a number of cases that jurisdictional disputes in the railroad industry do not belong in the courts but are left to the processes of mediation, conciliation and arbitration. *General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Southern Pacific Company*, 320 U. S. 338; *Brotherhood of Railroad Trainmen v. Toledo, P. W. R. Co.*, 321 U. S. 50; *Order of Railway Telegraphers v. Railway Express Agency*, 321 U. S. 342; *Order of Railway Conductors of America v. Pitney*, 326 U. S. 561. While the *Missouri-Kansas-Texas* and *Southern Pacific* cases, *supra*, to which both petitioner and respondent Brotherhoods herein were parties, dealt with matters coming primarily within the field of the National Mediation Board, the *Pitney* case, *supra*, was concerned directly with a matter within the jurisdiction of the National Railroad Adjustment Board and the principal opposing disputants therein were two labor organizations, to wit, the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, each of which had one of the five labor members on the First Division of the Adjustment Board.

Another reason which indicates clearly the undue importance attached by petitioner to a further review of this case is found in the unlikely recurrence of a factual situation such as is set forth in the complaint. The instant dispute is basically one over so-called seniority rights. Seniority is neither a constitutional nor a statutory right but is always one of contract (*System Federation No. 59 v. L. & A. Ry. Co.*, 119 F. 2d 509; *Elder v. New York Central R. Co.*, 152 F. 2d 361; *Starke v. New York, Chicago & St. Louis R. Co.*, 180 F. 2d 569) and as a contract right, is not a rule of uniformity, and hence on any particular carrier seniority has only such characteristics and attributes as may have been agreed upon on that railroad. The fact situation here, involving as it does agreements concerning seniority applicable to an unusual and special situation on the respondent carrier (R. 6, 7) from which special situation resulted a jurisdictional dispute between two employee organizations, may well be said to stand alone in its character. In ordinary railroad operation and for all that appears here, such dispute would not be likely to be duplicated. Hence, the so-called alignment of parties which "involves a three party dispute in which one labor organization is opposing a carrier and another labor organization" (Br. 12) and which alignment petitioner contends gives opportunity for its claim of lack of due process, has such little possibility of recurrence that the alleged importance of further review disappears.

2. The Court of Appeals and the District Court were fully informed concerning the contents of the deposition and petitioner's contentions and arguments therefrom, and no error may be predicated on a claim that petitioner's evidence was not heard.

In the Specification of Errors To Be Urged Number 4, petitioner claims error in the affirmance by the Court of Appeals of the judgment of the District Court dismissing the complaint "without hearing petitioner's evidence" bearing upon the claim of lack of adequate administrative remedy. We believe the short answer to this claim of error is that both the District Court and the Court of Appeals were fully informed concerning the details of petitioner's contention and gave full consideration thereto. Counsel for petitioner was requested by the District Court at pre-trial to state the contents of the deposition (R. 62) and counsel did state the substance of the deposition with respect to the contention of inadequacy of the remedy (R. 63), after which the Court expressed his view as follows:

> "I don't see how one member could testify to those facts to where they would have any probative value. It might be his opinion. I don't see how one member of the Board can tell you what the result of a hearing of a case will be that has never been presented to them."

Counsel next proceeded to expound further upon the contents of the deposition in its bearing upon this point (R. 64), and then said (R. 65): "That is in substance my argument."

In the Court of Appeals, as shown in the statement of facts, the petitioner was in no wise inhibited from quoting as desired from the deposition including exhibits, and from arguing at length therefrom, as has been done here, to the same degree and in the same manner as if the deposition had been spread in full upon the record of

the case. The narrative and, in some cases, the exact quotations from the deposition, which are referred to by page references in petitioner's brief herein, pp. 10, 12-16, are substantially identical with what was presented to and argued before the Court of Appeals in brief and in oral argument; and the Court of Appeals in its opinion indicated clearly that it had given consideration thereto.

Since both the District Court and the Court of Appeals gave full hearing in respect to all facts and contentions which petitioner desired to present, there could be no basis for the claim of error that the Court of Appeals affirmed the dismissal of the complaint by the District Court "without hearing petitioner's evidence." Even if technical error exist, it could not under the circumstances be prejudicial.

3. The evidence from the deposition, if admitted, upon which petitioner seeks to rely, would not substantiate or justify the claim of inadequacy of the administrative remedy or of lack of due process of law.

Under this point we consider petitioner's argument, as it relates to the Specifications of Error 1 to 3, which are similar in content.

Petitioner concedes that the question here involved requires "interpreting the provisions of one or more collective agreements." (Br. 9.) It apparently concedes also that in all cases, excepting only the instant controversy, involving the interpretation of a collective agreement concerning locomotive engine service, the jurisdiction of the First Division of the National Railroad Adjustment Board is exclusive, as the necessary result of the decisions of this Court in the cases of *Order of Railway Conductors of America v. Pitney et al.*, and *Slocum v. Delaware, L. & W. R. Co., supra.* The reason why the instant case is the exception to all rules, so petitioner

claims, arises out of the "alignment" (Br. 10) of the membership of the First Division. With the facts as to what persons compose the Division as presented by petitioner (Br. 10) we do not disagree, but with the conclusions drawn by petitioner from these facts we take exception; and especially do we take exception to the petitioner's contention and conclusion that it knows precisely and exactly how the carrier members individually or as a group or the labor members individually or as a group will vote in a particular case, and more especially when that particular case, as the instant dispute, is one which has never before been presented to the Division. The entire argument of petitioner is based upon a speculative conclusion, not supported by the evidence, erroneously drawn from the deposition upon which petitioner relies, that the carrier members arbitrarily would vote in this case to uphold the position of the Central of Georgia for no other reason than the fact that the Central of Georgia had taken such position. The substance of its argument on this point is that the five carrier members are appointed to the Board to represent carriers as a whole and will always vote to support the position taken by a carrier upon any particular claim and that the labor member on the Board appointed by the respondent Brotherhood would certainly vote with the carrier members to deny the instant claim because that was the position of the Brotherhood representative in dealing with the carrier. The complete conclusion of the petitioner is that the result is "inescapable" (Br. 12, 16) that at least six of the ten votes of the Board members would be against the claim (Br. 12). The conclusion is wholly unjustified.

Petitioner's argument is largely based upon a table showing disposition of claims by the First Division which was made a part of the deposition as Exhibit D thereto

(Appendix to Petition, p. 85). The apparent purpose of this table was to bolster assertions of petitioner's witness, Keiser. But it fails completely to do so; indeed, it proves the contrary.

This exhibit shows a disposition of claims by fiscal years from July 1, 1947 to June 30, 1950, and for the first half of the fiscal year 1951 covering period from July 1, 1950 to December 31, 1950. Petitioner's comments (Br. 13, 14) relate principally to the showing of the fiscal year July 1, 1947 to June 30, 1948. In that year 624 claims were voted on and in 528 of these claims the members cast a tie vote. Petitioner's comment is "their (tie) votes were cast on a strictly bi-partisan basis." These 528 claims were ultimately decided by referees. The assertion that the vote was on a strictly bi-partisan basis is the conclusion of the petitioner based merely on the fact that there was a deadlock. It gives no consideration whatever to the possible merits involved in the 528 claims, nor to the ultimate decision on those claims by impartial referees, nor does it allow for a difference of opinion on any basis except the strictly partisan basis claim. It is admitted, however (Br. 14), that, with respect to 96 awards made by unanimous vote of the Division, in 22 awards "partisan considerations" failed to control the vote of the carrier members, and in 59 of the awards partisan considerations did not control the vote of the labor members. In other words, in 22 instances out of 96 awards the carrier members did not accept the position of the carrier involved, and in 59 of the awards the labor members did not accept the position of the labor organization involved. Petitioner apparently concedes that in the cases last mentioned the carrier members and the labor members respectively voted on the basis of the merit or lack of merit but would deny any consideration of claims on the merits in all other cases.

We believe that a more reasonable view as to these other cases is to be obtained by a consideration of the entire exhibit showing the disposition of cases, including disposition by the referees, for the total period of three and one-half years. From such it appears that the carrier members joined with the labor members in sustaining 104 claims against the carriers involved; that the labor members joined with the carrier members in denying 386 claims against the carriers involved; and that in 111 other cases the carrier members and the labor members joined in a disposition of claims on a condition or compromise basis or in remanding or dismissing the claims. During this period there were 1914 awards made by referees. These 1914 cases had all been previously deadlocked and were all cases, including the 528 mentioned above, in which it was or would be claimed by petitioner that the carrier members and labor members voted solely on a "bi-partisan basis." In all of these 1914 cases the carrier members had voted against the allowance of the claims, and the labor members had voted in favor of sustaining the claims. But how did the impartial referees dispose of these claims? The exhibit shows that in 605 of these cases the awards were against the carriers; in 1005 cases the awards were against the employees; and that 304 cases were disposed of conditionally or were compromised, remanded or dismissed. Since the decisions of the impartial referees showed agreement in a large number of cases with the carrier members and in another large number of cases with the labor members, it is impossible, we submit, to draw the conclusions made by the petitioner that in every case, or in any number of cases, or in any particular case where the labor members and the carrier members disagreed, the vote was solely upon a "bi-partisan basis." Such conclusion is wholly arbitrary, to say the least. It certainly is within the realm of reason-

able probability that in the 605 cases in which the referees agreed with the vote of the labor members there had been merit and not merely partisanship in some or all of these cases in the position and vote which had been taken by the labor members. Similarly, it is within the realm of reasonable probability that in the 1005 cases in which the referees agreed with the vote of the carrier members there had been merit and not merely partisanship in some or all of these cases in the position and vote which had been taken by the carrier members. Merit cannot be excluded as a basis of the positions and votes of the respective members in any particular case or group of cases.

The inability of petitioner to predict the certainty of future voting by members of the First Division receives added force from the fact that not only has the instant case not been presented to the Division but no case of this kind has come before the Division for decision. The past voting record could not form a basis for determining how the members would vote upon a case such as the instant controversy involving a controversial matter between two of the labor organizations having members on the Division. If, *arguendo*, it be assumed that if this controversy were presented to the First Division, the Firemen's Brotherhood member would certainly vote to sustain the position of his General Chairman or his organization, and if it be assumed further that the Engineers' Brotherhood member would certainly vote to support the position of his General Chairman or his organization, it still could not be determined in advance as to how each of the other labor members would vote or how each of the carrier members would vote. It cannot be concluded in advance that the carrier members in a jurisdictional controversy would necessarily support the Engineers' Brotherhood, or that they would necessarily support the Firemen's Brotherhood; neither

can it be determined in advance that the carrier members in this kind of controversy, which has never before been presented to the Division for decision, would necessarily vote as a unit; nor can it be prophesied with certainty whether the other three labor members would vote as a unit or individually to support one or the other of the Engineers' Brotherhood or the Firemen's Brotherhood.

Certainly, in the light of the foregoing voting records of the carrier members as shown in the exhibit to the deposition above considered, it cannot be fairly concluded that in this particular case the carrier members would vote as a unit to support the position of the Central of Georgia. A total of 104 cases in which the carrier members refused to follow the contentions of the carriers involved, but instead voted to sustain the claims against such carriers, is no basis for the petitioner's "inescapable" conclusion that the carrier members would certainly vote to sustain the Central of Georgia in this case. How the carrier members would vote, where they would find merit, and whether with the position of the Firemen's Brotherhood or with the position of the Engineers' Brotherhood and the Central of Georgia, on the basis of the record shown are not predeterminable. Conclusions to the contrary are made for the occasion of the petition herein.

We submit, therefore, that petitioner is not entitled by any concept of reasonableness to make an omniscient prediction as to how either the labor members or carrier members would vote in any particular case presented to the Division.

Petitioner's contention that the doctrine of exclusive jurisdiction of the Adjustment Board, as announced in the *Pitney* and *Slocum* cases, should be modified on the basis of the additional argument advanced (Br. 20-23) concern-

ing claimed factual differences between those cases and the instant case, is also deficient. The bi-partisan character of the First Division of the Adjustment Board, the fact that the First Division of the Adjustment Board consists of ten members, five of whom are selected by the carriers, and five are designated by the national labor organizations of the employees, and the fact that each member of the Board is compensated by the party or parties he represents, are all matters of statutory provisions (Railway Labor Act, Sec. 3, 45 U. S. C. 153, First, (a), (g) and (h)). The controversy in the *Pitney* and *Slocum* cases is no different in character from the controversy in the instant case. The dispute in each of these cases was jurisdictional, and in fact appears to be identical in character with the instant controversy. In the *Pitney* case, as shown in the statement by the Court, 326 U. S. p. 562, the dispute revolved around separate agreements relating to the same work between the carrier and the Order of Railway Conductors on the one hand, and the carrier and the Brotherhood of Railroad Trainmen on the other, each of which opposing labor organizations has a member on the First Division of the Adjustment Board. In the *Slocum* case, as shown in the statement by the Court, 339 U. S. p. 240, the dispute arose out of the fact that there were separate collective bargaining agreements between the carrier and the Order of Railroad Telegraphers, on the one hand, and between the carrier and the Brotherhood of Railway Clerks, on the other, under which agreements both organizations claimed the same jobs for their crafts. Each of these organizations has a member on the Third Division of the Adjustment Board. With such knowledge of the bi-partisan character of the Board and the obvious jurisdictional nature of the disputes, the Court nevertheless concluded (Slocum, p. 244) "that the jurisdiction of the (Adjustment) Board to adjust

grievances and disputes of the type here involved is exclusive."

It is further submitted that the alleged interest of the members of the First Division of the Adjustment Board is not the direct, personal or substantial pecuniary interest which is necessary to raise a constitutional issue of due process. It is not claimed that any individual carrier member is financially interested in the respondent Central of Georgia, or has any any personal financial interest which would be adversely affected by a decision against a carrier. No labor member has a direct or personal financial interest in the outcome of the dispute. In the case of *Tumey v. State of Ohio*, 273 U. S. 510, relied upon by petitioner herein, this Court said, p. 523:

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."

The fact situation here brings the instant case within the purview of this statement, and takes it out of the application of the holding in the *Tumey* case.

There are numerous holdings of this Court to the effect that due process is not a term of fixed and invariable meaning. *Betts v. Brady*, 316 U. S. 455; *Federal Communications Commission v. WJR etc.*, 337 U. S. 265; *Gibbs v. Burke*, 337 U. S. 773; *Wolf v. Colorado*, 338 U. S. 25. Thus in *Betts v. Brady* it was said with respect to due process of law:

> "The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case.

That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice may, in other circumstances, and in the light of other considerations, fall short of such denial."

In the *Slocum* (p. 243) and the *Pitney* (p. 566) cases, *supra*, this Court has recognized the special competency and special qualifications of the Adjustment Board to "exercise its Congressionally imposed functions."

Upon the assumption that the unoffered deposition is properly before the Court for consideration, nevertheless, we submit that analysis of the "totality of facts" clearly demonstrates a lack of any substantial proof, in advance of a hearing by the Division, that the instant claims would not be heard on the merits, and we believe no occasion is shown which properly calls for review of the decision of the court below.

4. The constitutional question was not timely raised.

The constitutional question arising out of the claim of the lack of due process or violation of the Fifth Amendment was raised for the first time in this case in the petition herein.

If, as petitioner claims, as a result of the decisions in the *Slocum* and *Pitney* cases, there would ensue a lack of due process in the submission of the instant controversy to the exclusive jurisdiction of the First Division of the Adjustment Board, such lack of due process would be that inherent in the Act itself. Petitioner from the inception of this litigation could not have been unaware of that situation, but until the petition herein was filed there was no attempt made by petitioner to attack the constitutionality of the Railway Labor Act in any respect. The record below does not disclose any claim of unconstitu-

tionality of the statute or lack of due process in procedure established therein. While petitioner, at the hearing at pre-trial in the District Court, on the argument on the question of the court's jurisdiction, claimed that it would be a "futility" (R. 55) to submit the case to the First Division, it was not intimated at that hearing that the constitutionality of the Act was in any wise under attack. It is likewise true that the question of due process or constitutionality was not the subject matter of petitioner's position or contention in the Court of Appeals. Copies of the "Specification of Errors" and the "Points to be Discussed" as contained in the petitioner's brief in the Court of Appeals are appended hereto. They contain no reference to any claim of lack of due process or of unconstitutionality. The opinion of the Court of Appeals makes no reference whatever to any such contention. Rather, as pointed out in the opinion of that court (R. 77), it was the position of the petitioner that the court should assume jurisdiction of the controversy because of the claim that "the aggrieved party cannot secure an adequate remedy before the Adjustment Board and that the facts here so disclose." All that petitioner was seeking to obtain below was an exception to the doctrine of the *Slocum* and *Pitney* cases.[1] We believe the proceedings

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[1] In the Summary of petitioner's brief in the Court of Appeals petitioner said:

> "This Court is being asked to do two things. *First*, to rule that when a railway labor organization seeks to enforce on behalf of the employees it represents, justiciable rights granted to them by the Railway Labor Act and the organization is unable to secure an adequate administrative remedy from the Adjustment Board, the organization is not precluded by the *Pitney* and *Slocum* decisions from resorting to the courts for the relief it seeks. *Secondly*, this Court is asked to rule that on the basis of the factual showing offered to the

(Continued on following page)

below do not constitute even a veiled reference to an ultimate intention to raise a claim of unconstitutionality. In any event, such a claim was neither specified nor pressed. In contrast thereto petitioner, of course, makes it perfectly clear in this proceeding that it is seeking to raise a question of violation of the Fifth Amendment by reason of a claim of lack of due process.

No question of constitutionality was advanced or specified in the complaint. After all respondents had filed their answers in the District Court and had raised special defenses of jurisdiction (R. 24, 35) petitioner caused the deposition here in question to be taken (Appendix to Petition 15). Although the apparent purpose of that deposition was to lay the groundwork for attack on the Railway Labor Act or its procedure, when the amended complaint was filed some months subsequent to the taking of the deposition (R. 40-42) there was no intimation of a claim therein of lack of due process in, or unconstitutionality of, the Act or any part thereof. If petitioner had intended to raise the question of violation of the Fifth Amendment it should have specifically disclosed that intention in the complaint, or, in any event, in the amended complaint. *Kewanee Oil and Gas Co. v. Mosshamer* (C. C. A. 10), 58 F. 2d 711; *United States v. Davis,* 50 F. 2d 903; *Mount Tivy Winery Inc. v. Lewis,* 42 F. Supp. 636; *Denver Union Stock Yard Company v. United States,* 21 F. Supp. 83.

(Continued from preceding page)

District Court, the latter Court should have held that the appellant is manifestly unable to secure from the Adjustment Board administrative enforcement of the right asserted against the Central of Georgia in the present instance."

"This Court is being asked to ingraft, as it were, a qualification onto the doctrine enunciated by the Supreme Court in the *Pitney* and *Slocum* cases."

While this Court may consider questions not raised in the federal courts below, it is nevertheless the more usual practice not to consider such questions, and when it does so it is the exception and not the rule. Thus in *Duignan v. United States,* 274 U. S. 195, 200, the court said:

> "We do not consider the constitutionality of the forfeiture under § 23. The court below in enumerating the questions raised and presented made no mention of the constitutional question. The assignment of errors below did not refer specifically to it as required by the rules of that court; and so far as the record discloses it was not presented there * * *. This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." (Citing numerous cases.)

To the same effect are pronouncements of the court in *Blair v. Oesterlein Machine Company,* 275 U. S. 220, 225; *McGoldrick v. Compagnie Generale Transatlantique,* 309 U. S. 430, 434.

Without repeating the speculative and tenuous situations which make up petitioner's case herein, we submit that it is not an exceptional case as referred to in the authorities last quoted and cited above.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for the writ of certiorari herein should be denied.

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APPENDIX.

SPECIFICATION OF ERRORS.

(As stated in petitioner's brief in the Court of Appeals.)

1. The District Court erred in dismissing plaintiffs' complaint.

2. The District Court erred in holding that it was without jurisdiction of plaintiffs' complaint.

3. The District Court erred in failing to hold that it had jurisdiction of plaintiffs' complaint.

4. The District Court erred in ruling that it did not have jurisdiction of plaintiff's complaint notwithstanding plaintiffs do not have an adequate administrative remedy.

5. The District Court erred in declining to consider whether the plaintiffs could secure from the National Railroad Adjustment Board an adequate administrative remedy.

6. The District Court erred in failing to hold that the record establishes that plaintiffs could not secure an adequate administrative remedy from the National Railroad Adjustment Board.

7. The District Court erred in declining to hear evidence on the issue of federal jurisdiction.

8. The District Court erred in rejecting plaintiffs' offer in evidence of Walter C. Keiser's deposition.

POINTS TO BE DISCUSSED.

(As stated in petitioner's brief in the Court of Appeals.)

I. Must the District Court assume jurisdiction of a justiciable complaint involving the interpretation of a collective agreement in the railway industry if an adequate administrative remedy is not available from the National Railroad Adjustment Board.

II. Does the record show that there is not available to the appellant an adequate administrative remedy before the National Railroad Adjustment Board.

Supreme Court, U.S.
FILED
MAR 5 1953
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 554.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY,
GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS ON THE CENTRAL OF GEORGIA RAILWAY,
T. A. HOLLINGSWORTH, GENERAL CHAIRMAN,
H. L. BISHOP, JR., VICE CHAIRMAN,
H. E. HIMES, C. L. COWAN, H. L. STEPHENS, J. W. FARR and C. M. GOBER,

Respondents.

REPLY BRIEF BY PETITIONER, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

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Respondents.

REPLY BRIEF BY PETITIONER, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

The brief filed by Engineer respondents in opposition to petitioner's petition for writ of certiorari discusses a rule of procedure not heretofore considered by the petitioner's brief, and deserves to be answered. The discussion occurs on pages 25 to 28 of the Engineers' brief, and is to the effect that the petitioner did not attack the constitutionality of the Railway Labor Act in the courts below; that the issue is now being raised for the first time, and that it is not consistent with the usual practice of this Court to consider questions not presented to and

decided by the courts below. The respondent, in support of its argument, points to the fact that the petitioner did not raise the constitutional issue in its complaint or amended complaint. (p. 27, Engs. Brief.)

We are well aware of the rule of procedure referred to by the respondent. There is, however, no proper occasion for the application of this rule in the instant case, for reasons that we will shortly explain.

Knowledge regarding the origin or the purpose of a rule of law, either substantive or procedural, tends to prevent misapplication of the rule. This Court has several times stated the reason why it normally declines to rule upon questions and issues not considered below. One of the latest such statements appears in *McCandless v. Furland,* 293 U. S. 67, and is as follows:

> "The reason for the rule is the broad one that a defect found lurking in the record on appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court."

The foremost text authority on federal procedure, *Cyclopedia of Federal Procedure,* explains the rule and the purpose it serves in this manner:

> "Not only is review restricted to the judgment appealed from, but it is ordinarily further restricted to such questions and issues as were made and considered below and there decided, whatever the nature of the case, regardless of consent or stipulation, because the trial court cannot be guilty of any error in a ruling it has never made upon an issue to which its attention has never been called. * * *.
>
> "The Supreme Court has said that the reason for such rule is the broad one that a defect found lurking in the record on appeal may not be allowed to defeat recovery, where the defect might have been

remedied, if the objection had been seasonably raised in the trial court, and that this practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." (Vol. 14, Sec. 67.09.)

Referring now to the record of procedure in the instant case, we first point out, in answer to the Engineers' contention, that there was not the slightest reason or excuse for the complaint raising the constitutional issue now presented to this Court. The purpose of petitioner's complaint was the enforcement of the right given by Section 2, Seventh (45 U. S. C. Sec. 152) of the Railway Labor Act to employees and their craft representative to require carriers to maintain "rates of pay, rules or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act." *

An attack upon the validity of any portion of the Railway Labor Act would have been wholly foreign to the cause of action asserted in the complaint. The constitutional issue could enter the case only in consequence of the respondents' answers. These answers challenged the

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* The brief filed by the Engineer respondents states that "the primary and fundamental question presented by the complaint and amended complaint is one involving only the interpretation or construction of a collective bargaining agreement."

A reading of the complaint completely refutes this assertion. The complaint does not pray for the interpretation of a collective agreement. It seeks only to require the Central of Georgia to abide by its agreements until changed in a lawful manner. The occasion for interpreting a collective agreement is but incidental to the relief sought by the plaintiffs and is necessitated only because of the Central of Georgia's defense denying that it had changed the employees' rules and working conditions as contained in the agreements.

See the more comprehensive discussion of this subject at pages 4 and 9 of petition for writ of certiorari and brief.

jurisdiction of the District Court on the ground that the plaintiffs were obliged to present their complaint to the National Railroad Adjustment Board in consequence of the decisions by this Court in *Order of Railway Conductors v. Pitney*, 326 U. S. 561, and *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239.

Since the Federal Rules of Civil Procedure do not authorize a reply to an answer except when the answer contains a counterclaim or the court orders a reply to be made (Rule 7(a)), the pleadings before the District Court did not, and could not, present on their face a constitutional issue. The constitutional issue could be raised only at trial, or at pre-trial, when the plaintiffs might expect to have an opportunity to present their defense to the defendants' attack on the court's jurisdiction. But at pre-trial, when plaintiffs were prepared with evidence to demonstrate the unavailability of an adequate administrative remedy before the National Railroad Adjustment Board and, hence, the denial of due process that would occur if the court followed the rule of equity jurisdiction announced by this Court in the *Pitney* and *Slocum* decisions, the opportunity was not forthcoming.

The District Court did not permit the constitutional issue to be discussed. It neatly sidestepped the issue by the simple process of declaring at pre-trial that on the face of the pleadings it was apparent that in the course of resolving the complaint the court would be called upon to interpret a collective agreement. *Ergo*, the *Pitney* and *Slocum* decisions required the court to dismiss the complaint.

When petitioner's counsel sought to have the court hear its evidence regarding the unavailability of an administrative remedy before the Adjustment Board, the court flatly refused to give any consideration to the evi-

dence, saying: "No, sir. I am not hearing any evidence on the matter. I am deciding it on the question of jurisdiction." (R. 69.)

Obviously, unless and until the plaintiffs were allowed to present their evidence to show that their grievance was one that the Adjustment Board could not handle and decide on its merits, there was no occasion or excuse for court or counsel to weigh the constitutional question growing out of the court's denial of jurisdiction in this instance on the strength of the *Pitney* and *Slocum* doctrine.

The strategy of the defendants, after their success in the district court, was, of course, to prevent the petitioner from having an opportunity to have its evidence considered by the Court of Appeals and by this Court. When a constitutional issue rests upon evidence, success in suppressing the evidence is tantamount to success on the constitutional issue. The respondents, accordingly, resisted the petitioners' efforts to get their evidence before the Court of Appeals (See separate Appendix to Petition for Writ of Certiorari, pp. 5-7). Insofar as the opinion of the Court of Appeals discloses, one is entitled to assume that that court did not consider this evidence. Counsel for the Central of Georgia support this conclusion (P. 3, Brief of Central of Georgia). And respondents' strategy along this line is being continued in this Court. Unless these tactics are recognized for what they are and defeated, the petitioner and those whom it represents will have been done an injustice.

In its brief to the Court of Appeals the petitioner listed a specification of errors and points to be discussed that dealt specifically and repeatedly with the inadequacy of any administrative remedy available to the petitioner before the Adjustment Board. (See specification of errors

and points to be discussed presented to Court of Appeals, appearing on pages 30-31 of respondent Engineers' Brief.)

In the field of federal administrative law an issue regarding the adequacy and fairness of an administrative hearing is a due process issue, based upon the Fifth Amendment. See 42 *Am. Jur.*, Public Admin. Law, Sec. 137; *Railroad Comm. v. Pac. Gas & Elec. Co.*, 302 U. S. 388, 393; *Kessler v. Strecker,* 307 U. S. 22, 34; *Ohio Bell Tel. Co. v. Pub. Utilities Comm.*, 301 U. S. 292, 304. To discuss adequacy and fairness of hearing except in terms of due process, is without legal purpose.

Moreover, in argument before the Court of Appeals counsel for this petitioner dwelt upon the denial of due process of law to the petitioner that would result if the courts refused jurisdiction of petitioner's complaint and left the petitioner with no tribunal to go to in this instance for the protection of the firemen's contract rights except the Adjustment Board. And in argument and in brief the federal decisions, particularly *Tumey v. Ohio,* 273 U. S. 510, were reviewed and their pertinence to the due process issue before the Court elaborated upon.

In view of the foregoing facts, we respectfully submit to this Court that the constitutional issue presented to this Court by petitioner's petition for writ of certiorari was raised in the courts below as fully and in as appropriate a manner as the procedural circumstances permitted, and that there is no basis in the record for concluding nor any grounds for assuming that counsel for the respondents have failed to recognize the constitutional issue that petitioner has consistently sought to bring to the fore throughout this litigation from the time that the parties stipulated for the taking of the Keiser deposition (p. 13, Separate Appendix).

Before concluding this reply brief, observations regarding arguments advanced by the Engineers on three other points deserve brief comment.

The petitioner pointed out in its original brief the fact that the voting record of the members of the First Division of the Adjustment Board over a substantial period of time discloses that the carrier members, without exception, have surrendered the right to vote independently on the merits of claims, by always voting together as a unit; that the labor members do likewise, except when two labor organizations take opposing positions in a dispute on the property, in which event the representatives of these organizations on the First Division have, since the inception of the Adjustment Board, considered themselves bound to vote on the claim in a manner that would sustain the positions taken by their respective organizations in the argument. *The voting record virtually forecloses any other result for this petitioner than an automatic six-to-four vote against its claim if it were submitted to the First Division.*

The gist of the Engineers' answering argument, on pages 17 to 24 of their brief is that they can foresee, on the basis of the voting record, a possibility that an automatic six-to-four vote would not be entered against the petitioner's claim.

We deny that the voting record justifies any other conclusion than that held by this petitioner if its complaint in the instant case were submitted to the Board. But if, for purposes of argument, the bare possibility of a different outcome be conceded, we suggest that the Engineers' contention ought not to prevail because of the conclusive nature of an adverse decision by the Adjustment Board. There is no right of review in the courts of an adverse ruling by the Board on a claim. A ruling

adverse to the claim concludes the matter forever. *Washington Terminal Co. v. Boswell,* 124 F. 2d 235, affirmed per curiam by divided court, 319 U. S. 732; *Berryman v. Pullman Co.,* 48 F. Supp. 542; *Ramsey v. C. & O. R. Co.,* 75 F. Supp. 740.

On pages 13 and 14 of Engineers' brief the contention appears that the dispute between the petitioner Brotherhood and the respondent Brotherhood is a *jurisdictional dispute* in the sense in which that term was used by this Court when deciding *General Committee of Adjustment of B. of L. E. v. M.-K.-T. R. Co.,* 320 U. S. 323, and *General Committee of Adjustment of B. of L. E. v. Southern Pac. Co.,* 320 U. S. 388. This contention is so clearly violative of basic concepts understood by all persons having a comprehensive knowledge of labor relations and labor law as to suggest that "any old port in a storm" must be these respondents' guiding philosophy in their effort to prevent this case from being heard by this Court.

The *Katy* and *Southern Pacific* cases involved true jurisdictional disputes. The issues in these cases, as in all jurisdictional disputes, was the right of an organization to *represent* certain employees for collective bargaining purpose. These disputes, this Court rightly held, are not appropriate for judicial determination.

But the term "jurisdictional dispute" as used by the labor members of the First Division in their letter of March 7, 1936, addressed to the chief executives of their respective organizations (Petitioner's brief, p. a 21), and as used by petitioner throughout this case, refers to any type of dispute over working rights or seniority in which two labor organizations are contending for opposing views. The jurisdiction of the Adjustment Board does not extend to jurisdictional disputes in the true sense, and the re-

spondent Engineers' citation of the *Katy* and *Southern Pacific* cases as authority for the proposition that the instant dispute is also a jurisdictional dispute and, hence, should not for this reason be heard by the courts, is simply an attempt at confusion.

At page 12 of the brief of respondent Engineers it is asserted that this is the first case in which the procedure of the National Railroad Adjustment Board has been attacked as inadequate and lacking in due process. This assertion does not have due regard for the decisions of this Court in *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, and *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, wherein petitioner Brotherhood, along with co-defendant railroads, contended that the Negro firemen, plaintiffs, should have presented their grievances to the Adjustment Board rather than to the courts. In the *Steele* and *Tunstall* cases the court took cognizance of the fact that aligned against the Negro plaintiffs was a majority of the members of the Adjustment Board—five members representing the carriers and the officer of petitioner Brotherhood, six of a total of ten members. The Court held that under such circumstances plaintiffs did not have an adequate administrative remedy and the courts should have entertained plaintiffs' complaint. (323 U. S. 205.) Another decision of like effect is *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768.

In conclusion, we wish again to call to the attention of the Court the fact that petitioner's evidence contained in the deposition was not considered by the lower courts. Petitioner requests that this Court issue its writ of certiorari as prayed for in the petition and that it rule upon the issues presented in the petition on the basis of the record filed in this Court and the Keiser deposition.

Should the Court be reluctant to resolve the issues on such basis, we suggest that the case be remanded with instructions to the lower courts to rule upon the question whether petitioner has an adequate administrative remedy at the hands of the National Railroad Adjustment Board.

Respectfully submitted,

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